SUPREME COURT, U. S.

No. 515

# In the Supreme Court of the United States

OCTOBER TERM, 1969

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UNITED STATES OF AMERICA AND HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, PETITIONERS

*v.*

GIFFORD-HILL-AMERICAN, INC., UNITED CONCRETE PIPE CORPORATION AND LLOYD R. EARL

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the United States and Judge Sarah T. Hughes,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in these cases on June 2, 1969.

## OPINIONS BELOW

The final opinion of the court of appeals (App. A, pp. 15-42) is not yet reported; its interim opin-

[1] Judge Hughes has been added as a petitioner to avoid any possible problem concerning the proper party to seek review of the decision below which granted a writ of mandamus.

ion (App. B pp. 43-50) is reported at 388 F.2d 236. The original order of the district court (App. C pp. 51-54) is reported at 41 F.R.D. 538; its subsequent order (App. D pp. 55-57) is not reported.

## JURISDICTION

The writ of mandamus of the court of appeals was granted on June 2, 1969 (App. A pp. 16, 42). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether criminal defendants may obtain grand jury transcripts as "documents within the possession * * * of the government" that are material to their defense under Rule 16(b) of the Federal Rules of Criminal Procedure without the showing of particularized need heretofore required under Rule 6(e).

2. Whether corporate defendants in criminal antitrust cases may obtain the grand jury testimony of all their present or former officers and employees concerning their corporate activities, on the ground that such testimony is the "recorded testimony of the defendant" within the meaning of F.R. Crim. P. 16 (a)(3).

## RULES INVOLVED

Rules 6(e), 16(a)(3), 16(b) and 16(e) of the Federal Rules of Criminal Procedure provide, in relevant part, as follows:

6(e): *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding * * *.

16(a)(3): *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant * * * recorded testimony of the defendant before a grand jury.

16(b): *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. * * *

16(e): *Protective Orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. * * *

## STATEMENT

### 1. The Initial District Court Proceedings.

On January 20, 1966, a grand jury in the Northern District of Texas returned an indictment in Dallas charging the respondents, Gifford-Hill-American, Inc., United Concrete Pipe Corporation, and Lloyd R. Earl, former Chairman of United, with violations of Section 1 of the Sherman Act, 15 U.S.C. 1. The defendants filed various motions for discovery, including motions under Rule 16(a)(3)[2] for the disclosure of the testimony given by all present and former employees of the defendant corporations before the grand jury which returned the indictment in the instant case and before a Los Angeles grand jury which had returned an indictment in a previous case involving some of the same defendants, and motions under Rule 16(b) for the disclosure of the complete Dallas and Los Angeles grand jury transcripts, as material "documents" in the possession and control of the government.

These motions were heard by District Judge Sarah T. Hughes, who on September 19, 1966, entered an order (App. C pp. 51-54) which provided that, "under Rule 16(a)(3) of the Federal Rules of Criminal Procedure a corporate defendant in a criminal antitrust action is entitled, without a showing of particularized need, to inspect the grand jury transcripts of testimony of its officers." Although she directed disclosure of the testimony of all present or former officers

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[2] Revised Rule 16 of the Federal Rules of Criminal Procedure became effective on July 1, 1966. 383 U.S. 1087.

of the corporations, Judge Hughes denied the defense motions for discovery of the testimony of non-officer employees under Rule 16(a)(3) and denied *in toto* the defendants' motion for discovery of grand jury transcripts under Rule 16(b).

**2. The Mandamus Petitions and the Interim Proceedings**

The United States petitioned the Court of Appeals for the Fifth Circuit for a writ of mandamus to test Judge Hughes' ruling that the defendants were entitled as a matter of right to discovery of the grand jury testimony of all corporate officers. The defendants cross-petitioned for mandamus, claiming that the trial court had erred in not directing (1) discovery of the grand jury testimony of all the corporate defendants' present and former employees under Rule 16(a)(3), and (2) inspection of the Dallas and Los Angeles grand jury transcripts under Rule 16(b).

On January 5, 1968, the court of appeals issued an interim opinion (App. B pp. 43-50) in which it noted that Judge Hughes had ordered disclosure based "entirely on Rule 16(a)(3) as a matter of right," and suggested that prior to its further hearing on the petitions, the parties might seek "from the Trial Court production on discretionary principles * * *" (388 F.2d 236, 239).

Following that opinion, the defendants made a motion before Judge Hughes, seeking, as a matter of discretion under Rule 6(e), discovery of the grand jury testimony previously claimed as of right under Rule 16. Finding "particularized need" with respect

to the grand jury testimony of corporate officers previously ordered disclosed under Rule 16(a)(3) and the testimony of two additional individuals, Judge Hughes granted disclosure under Rule 6(e). Judge Hughes found, however, that the defendants had not shown a particularized need for the grand jury testimony of several corporate employees. (App. D p. 56.) Since Judge Hughes' new ruling was based on a discretionary determination of particularized need under Rule 6(e), the United States concluded that its petition for mandamus had became moot, and so informed the court of appeals (App. A p. 19). The defendants' cross-petitions remained viable, however, since they sought, as a matter of right under Rule 16(a)(3) and 16(b), the disclosure of grand jury testimony that Judge Hughes had again denied.

### 3. The Final Decision of the Court of Appeals

On June 2, 1969, the court of appeals granted defendants' mandamus petitions and directed discovery consistent with its opinion (App. A p. 42). The Court held that "under Rule 16(a)(3) the defendant corporations may discover the testimony of all present and former officers and employees concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to their employment" (App. A p. 32). The court further held that grand jury transcripts are discoverable as "documents" within the meaning of Rule 16(b) (App. A pp. 36-40), rejecting the government's arguments that grand jury testimony can be discovered only on a showing of "particularized need" under Rule 6(e), or under Rule 16(a)(3) (App. A pp. 36-38). It held that Rule

6(e)'s "particularized need" requirement as previously enunciated by this Court,[3] is of no relevance to the discovery of transcripts under Rule 16 (App. A pp. 38-40).

## REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the interpretation and inter-relation of Rule 6 and Rule 16 of the Federal Rules of Criminal Procedure. The decision of the court below has radically departed from the policy of grand jury secrecy embodied in Rule 6(e) by construing Rule 16(b) as authorizing the disclosure of the entire transcript of a grand jury proceeding without the necessity for showing a "particularized need." In addition, by interpreting Rule 16(a)(3) to give the corporate antitrust defendants virtually automatic access to the grand jury testimony of all present and former employees, the court of appeals has denied corporate employees the protection which the secrecy rule is intended to afford witnesses. The net result of the opinion below is to strip from the grand jury proceedings the veil of secrecy which has long been recognized to be essential to the proper exercise of the grand jury's investigative function. If allowed to stand, the decision below will have a severely adverse impact upon antitrust enforcement and the general administration of criminal justice.

1. The conclusion of the court of appeals that new

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[3] See *Dennis* v. *United States*, 384 U.S. 855; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395; *United States* v. *Procter & Gamble Co.*, 356 U.S. 677.

Rule 16(b) was intended to authorize the disclosure of grand jury testimony is inconsistent with the development of the discovery procedures embodied in Rules 6 and 16. Prior to the 1966 amendments to the Federal Rules of Criminal Procedure, grand jury transcripts were discoverable only under Rule 6(e) upon a showing of "particularized need." *Dennis* v. *United States*, 384 U.S. 855; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395; *United States* v. *Procter & Gamble Co.*, 356 U.S. 677. Had the drafters of the revised rules intended to broaden the scope of discovery of grand jury testimony by making it subject to discovery under Rule 16(b), they could have easily done so by expressly including grand jury testimony as an item subject to discovery under that rule. In view of the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts" (*Procter & Gamble*, *supra*, 356 U.S. at 681), it is unlikely that the drafters would have made such a radical change in the principles governing disclosure of such testimony without an express statement of their intent to do so. The absence of any such indicated intent is thus persuasive evidence that no such change was intended, particularly in light of the readoption of the grand jury secrecy provision in Rule 6(e).[1] That the failure to express such

[1] Rule 6(e) was promulgated again, substantially in its previous form but with an amendment intended to clarify that typists and transcribers of recorded grand jury testimony are bound to the "obligation of secrecy." This amendment shows that the Rule was not simply readopted but was reconsidered in the context of continuing concern for the principle of grand jury secrecy, before re-adoption.

an intent was no inadvertent is clear from the fact that in drafting subsection (a) of Rule 16, the revisors clearly expressed their intent to provide for disclosure of "recorded testimony of the defendant before the grand jury."

The Fifth Circuit's interpretation of new Rule 16 (b) would violate the long-standing policy of encouraging free disclosure to grand juries through the careful maintenance of grand jury secrecy. Under the ruling below the "particularized need" standard of Rule 6(e) has been abandoned and grand jury transcripts are to be made available under the less exacting standard of materiality under Rule 16(b). Thus, the process of balancing the defendant's need for disclosure against the public interest in maintaining the secrecy of grand jury proceedings which was achieved under the "particularized need" test will have no further application to the discovery of grand jury transcripts. Its protection for grand jury witnesses, and its propensity to encourage free testimony to federal grand juries, will be lost.

The sweeping discovery of grand jury testimony which the court of appeals has sanctioned cannot be justified on the court's theory that there is little need to maintain secrecy because the identity and testimony of witnesses before the grand jury will be disclosed during the course of the trial. There are many instances in both organized crime and antitrust investigations where witnesses called before the grand jury give valuable testimony concerning the activities under investigation which leads to other evidence that is sufficient to convict the defendant, so

that the grand jury witness need not be called at trial. For example, an individual, by testifying about the existence of meetings and correspondence relating to price-fixing activities, can supply the grand jury with leads that will enable it to subpoena the documents and the persons who attended those meetings. In such a situation the government could assure the person supplying the original information that he would not have to testify at trial. Moreover, even where the grand jury witnesses do testify at trial, both the motive and the ability of the defendants to coerce them to change their testimony is substantially less after the witness has testified on direct examination at the trial than it would be before trial.[2]

Nor is the court below correct in its assumption that the protective order provisions of Rule 16(c) are sufficient to protect the interests of grand jury witnesses. In the first place, in the scheme of Rule 16, protective orders are reserved for exceptional circumstances and thus, would not protect the ordinary grand jury witness whose testimony was disclosed

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[2] The ruling of the court below will lead to the anomalous result that where a person supplies his information in the form of a statement to an investigating agent, that statement will not be available to the defense prior to trial; but where the person then testifies before the grand jury about the same matter his testimony must be disclosed. The court's assertion that the failure of the drafters expressly to exclude grand jury testimony from the operation of Rule 16(b), as they excluded statements given to investigative agents, supports the view that they intended the disclosure of grand jury testimony, is not persuasive. No doubt the drafters believed that since the secrecy of grand jury testimony was expressly dealt with in Rule 6(e), there was no need to refer to it in Rule 16(b).

prior to trial from attempts to coerce or intimidate him in order to get him to change his testimony at trial. In the second place, even in those situations where the circumstances are extraordinary enough to warrant an application for a protective order, the mere fact that an application to prevent disclosure of a particular witness' testimony is made will clearly indicate to the defendant that the witness has given damaging testimony and, thus, may make resort to the protective order fruitless.

2. The court below similarly disregarded the policy of protecting the secrecy of grand jury proceedings in construing Rule 16(a)(3), in the context of a criminal antitrust case, to give a corporate defendant the right to discover "the testimony of all present and former officers and employees concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to their employment" (App. A p. 32).

Rule 16(a)(3) provides that a defendant may be granted the right to discover the grand jury testimony "of the defendant." Since corporations cannot speak for themselves, the fundamental question which arises when a corporation is the defendant is that of the extent to which the testimony of the corporation's officers or employees should be considered the testimony of the defendant corporation.

We submit that under Rule 16(a)(3) corporate defendants in criminal antitrust proceedings should be able to discover the relevant grand jury testimony only of present or former corporate personnel so situated (at the time of the allegedly unlawful acts or

at the time of the grand jury proceedings) that they could legally bind the corporation with respect to the type of business activity which was the subject of the criminal indictment.[8] Under this functional approach, a corporate defendant in an antitrust proceeding could generally discover the testimony of its officers; it could obtain testimony of other employees only where their corporate position is such that, in relation to the type of activity complained of, they properly should be viewed as acting for the corporation.

This approach would strike a sound balance between fair discovery and the legitimate need for grand jury secrecy. Discovery under Rule 16(a)(3) of the grand jury testimony of those individuals who can and do act for the corporation would be permitted; the existing requirement of "particularized need" would be maintained as to lower level employees who are less likely to have a community of in-

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[8] In the courts below the government argued that, since a corporation does not testify before the grand jury, a corporate defendant could not discover any grand jury testimony under Rule 16(a)(3). Upon further reflection, however, we believe that the position taken in the text is more consonant with the language of the Rule and a policy favoring more liberal discovery.

A conceptually similar test for the scope of corporate discovery under Rule 16(a)(3) appears at 8 *Moore's Federal Practice*, Second Edition, ¶ 16.05[2], pp. 16-39 - 16-40, where the author states: "Although the question may be tenably argued in several ways, a practical solution might be to permit discovery under Subdivision (a)(3) of testimony of all persons whose statements might be used against the defendant-corporation on the theory of representative admissions or vicarious liability. Other testimony would be left to motions based on a 'particularized need'."

terest with the corporation and who have a greater need for protection from economic reprisal.[7]

The court below, however, accepted an approach to Rule 16(a)(3) that will have the practical effect of virtually assuring the disclosure to a corporate defendant of the grand jury testimony of any present or former officer or employee. Such a rule will be seriously detrimental to the effective enforcement of the antitrust laws. Grand jury testimony by employees and ex-employees is essential to the returning of criminal antitrust indictments. Protection against the possibility of economic retaliation has been a continuous policy of the law regarding the disclosure of grand jury testimony, and this Court has noted its particular application to antitrust cases.[8] As shown above, the protective order provisions of Rule 16(e) would provide little protection for the corporate em-

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[7] Petitioners here assume, as is also implicit in the test referred to in the preceding footnote, that aside from Rule 16(a)(3), grand jury transcripts continue to be subject to the "particularized need" test. This is, of course, inconsistent with the Fifth Circuit's theory as to the scope of Rule 16(b).

[8] In *United States* v. *Procter & Gamble*, 356 U.S. 677, at 681-682 the Court said: "One [reason for secrecy] is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." Similarly, in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, at 400, this Court observed, "testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness."

ployee who is willing to tell all he knows about his employer's antitrust violations on the assurance that his testimony will be kept secret. The mere fact that the government seeks a protective order as to that witness' testimony would clearly indicate that the witness has testified against his employer's interest.

3. As the court below observed at the outset of its opinion, this case raises "important questions concerning the construction of the discovery provisions of the recently revised Federal Rules of Criminal Procedure, Fed. R. Crim. P. 16." (App. A p. 16.) These questions will continue to arise frequently in the lower courts and to be resolved with divergent results.[10] Their immediate review by this Court is important to provide a definite guide to the lower courts and to avoid further confusion in an important area of criminal law enforcement.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1969.

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[10] The court's opinion below contains a summary of the varying results reached by the trial courts in their efforts to construe Rule 16(a)(3) in the corporate setting (App. A p. 30 and n. 27).

## APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24101

UNITED STATES OF AMERICA, PETITIONER

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

No. 24120

GIFFORD-HILL-AMERICAN, INC., PETITIONER

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

No. 24121

UNITED CONCRETE PIPE CORPORATION and LLOYD R. EARL, PETITIONERS

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

## *Petitions for Writs of Mandamus to the United States District Court for the Northern District of Texas*

(June 2, 1969)

Before GODBOLD and SIMPSON, Circuit Judges, and MCRAE, District Judge.

GODBOLD, Circuit Judge: These three petitions for writs of mandamus raise important questions concerning the construction of the discovery provisions of the recently revised Federal Rules of Criminal Procedure, Fed. R. Crim. P. 16.[1] The cases were

[1] The revised Rule 16 and the Advisory Committee's Notes appear at 39 FRD 163, 173-78 and at 18 U.S.C.A. Rule 16 (Supp. 1969). Parts of the Rule pertinent to this case are as follows:

> (a) *Defendant's Statement; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph . . . (3) recorded testimony of the defendant before a grand jury.
>
> (b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to

assigned for oral argument and supplemental briefing in an earlier opinion of this court. *United States* v. *Honorable Sarah T. Hughes*, 388 F.2d 236 (5th Cir. 1968).

All three cases arise out of a pending Sherman Act prosecution [2] in the Northern District of Texas. An indictment was returned January 20, 1966, charging United Concrete Pipe Corporation, Gifford-Hill-American, Inc., and Lloyd R. Earl, formerly Chairman of the Board of United, with conspiracy to fix prices, to submit rigged non-competitive bids and to divide the Texas market for concrete pressure pipe. The defendants in that criminal prosecution are the petitioners in Nos. 24120 and 24121. The United States is the petitioner in No. 24101.

On July 21, 1966, and subsequently,[3] the defendants filed pre-trial motions for discovery under Rule 16.[4] Under Rule 16 (a) (3), which allows a defend-

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agents of the government except as provided in 18 U.S.C. § 3500.

(e) *Protective Orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

[2] 15 U.S.C.A. § 1 (1963).

[3] The effective date of the amendment of Rule 16 was July 1, 1966.

[4] The defendants' motions are set out in detail in sections 3 and 4 of this opinion, *infra*.

ant to discover his recorded testimony before a grand jury, they moved for the production of the testimony of all present and former officers and employees of the corporate defendants before the Dallas, Texas grand jury which returned the indictment and a Los Angeles grand jury which previously had investigated a similar alleged conspiracy involving some of the defendants in the Texas prosecution. The defendants also moved under 16 (b), which allows a defendant discovery upon a showing of materiality to the preparation of the defense and of reasonableness, for the production of all documents material to the preparation of the defense, including transcripts of the Dallas and Los Angeles grand juries.

In an order reported at 41 F.R.D. 538,[5] the motions were granted in part and denied in part. Under 16 (a) (3) District Judge Hughes allowed the corporate defendants to discover the testimony of officers and former officers before both grand juries.[6] Under 16 (b) she allowed the defendants to discover documents submitted by all witnesses to the Dallas grand jury and by two key witnesses to the Los Angeles grand jury. Both the prosecution and the defendants filed the instant petitions attacking the court's rulings.

Following our initial opinion in this case, and pursuant to a suggestion therein, the defendants filed supplemental motions in the district court seeking discovery of the testimony of officers and employees

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[5] This order subsequently was amended in minor respects in an unreported order.

[6] The order was in terms of "officers" but one of the individuals named was an ex-officer of one of the corporate defendants.

on the basis of Fed. R. Crim. P. 6 (e).[7] The district court, on a finding of particularized need, granted the same discovery under Rule 6 (e) which it previously had granted under its 16 (a) (3) order, plus the testimony of two named employees of United.[8] The court refused to grant discovery of the testimony of several additional employees on the ground that no particularized need existed.

Although the government insists that the district court's original order is erroneous insofar as it rests on Rule 16 (a) (3), it does not attack the second order issued under Rule 6 (e). Since the second order grants the same relief as the first (plus the testimony of two additional witnesses), the government's mandamus petition, No. 24101, is effectually mooted. However, since the testimony of defendants' employees granted under the Rule 6 (e) order is that of less than all their employees, and since they claim to be entitled to the testimony of all employees as a matter of right under Rule 16 (a) (3) and 16 (b), their petitions remain viable.[9]

The issues that now remain for decision are:

> (I) Is mandamus an appropriate remedy in this case?
>
> (II) Under Rule 16 (a) (3), are the corporate defendants entitled to discovery of the testimony given before the Los Angeles and Dallas

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[7] Also the motions reasserted 16(b) as a basis for discovery.

[8] The second order also removed a restriction in the first order which had prohibited the defendants from exchanging discovered information.

[9] The government does not contest the 16(b) order. However, it does oppose the defendants' claim that they are entitled to broader discovery under 16(b) than was granted.

grand juries by their present and former officers and employees?

(III) Did the court properly refuse the defendants' motions under Rule 16 (b) for the production of all documents in the government's possession material to the preparation of the defense and for the disclosure of the grand jury transcripts?

## 1. Propriety of mandamus

All parties join in urging that mandamus is an appropriate remedy. But if we lack judicial power parties may not confer it upon us by concurring in a request for action. Therefore, we undertake an independent evaluation of the propriety of mandamus in this case.

The jurisdictional predicate of the All Writs Act, 28 U.S.C.A. § 1651, traditionally has been that a writ "issue in aid of an exercise of the Court of Appeals' appellate jurisdiction." *Will* v. *United States*, 389 U.S., 90, 95 n.4, 19 L.Ed. 2d, 305, 310 n.4 (1967).[10] The Court in *Will* illustrated differing views of this requirement's application to interlocutory orders in criminal cases with the following citation: "Compare *In re United States*, 348 F.2d 624 (C.A. 1st Cir. 1965) with *United States* v. *Bondy*, 171 F.2d 642

[10] Several recent cases point toward an expansion of the scope of mandamus in the exercise of the "supervisory control of the District Courts by the Courts of Appeal." See LaBuy v. Howes Leather Co., 352 U.S. 249, 259-60, 1 L.Ed. 2d 290, 299 (1957); Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968); *In re* Watkins, 271 F.2d 771 (5th Cir. 1959). Since we conclude that the issuance of the writ is in aid of our appellate jurisdiction in the more traditional sense, we do not rely upon a rationale of an independent supervisory power as a basis for jurisdiction.

(C.A. 2d Cir. 1948)." *Id.* In *Bondy* the government sought mandamus to determine the propriety of a pre-trial order granting discovery to the defendants. The Second Circuit pointed out that because the government may not appeal in a criminal case, the order could not otherwise be reviewed by the court of appeals. It concluded that mandamus was not appropriate since "we have neither actual nor potential jurisdiction to review the order." 171 F.2d at 664. The First Circuit took a broader view of "potential jurisdiction" in *In re United States, supra*. Because an order allowing a criminal defendant to take depositions of government witnesses could be tested prior to trial by a contempt proceeding or by dismissal of the indictment, Judge Aldrich stated, "we see no reason why the government should not be able to do directly what it could effectuate indirectly." 348 F. 2d at 625.

The present case fits within the views of both the First and Second Circuits of "potential jurisdiction." Because of the present posture of the case the relief which we could grant on mandamus would operate in favor of the defendants. The defendants, the only parties claiming to be prejudiced by the 16 (a) (3) and 16 (b) orders, could, if convicted, challenge those orders on appeal. By passing on the court's orders at this juncture we would, in Judge Aldrich's terms, be doing directly what we could do indirectly. Moreover, unlike *Bondy*, we would not be reviewing an interlocutory order which could not be otherwise reviewed in the court of appeals. Insofar as the jurisdictional prerequisites of 28 U.S.C.A. § 1651 are concerned, we conclude that the mandamus petition is properly before us.

Our finding of jurisdiction is only the beginning of the inquiry. As the Supreme Court emphasized in

*Will*, even when mandamus is within a court's jurisdiction it may be employed only in exceptional causes. *See also Ex parte Fahey*, 332 U.S. 258, 260, 91 L. Ed. 2041, 2043 (1947). We recognize, and reiterate, that extraordinary prerogative writs may not be used indiscriminately to review interlocutory orders, *La Buy* v. *Howes Leather Co.*, *supra*, or to thwart the Congressional policy against piecemeal appeals, *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26, 87 L.Ed. 1185 (1943), or to alleviate the hardship resulting from an unnecessary trial in a particular case, *United States* v. *Alkali Export Ass'n*, 325 U.S. 196, 202-03, 89 L.Ed. 1554, 1560 (1945). Our reluctance to interfere with the progress of a trial is especially strong in criminal cases, where the Sixth Amendment guarantee of a speedy trial is present. *See, e.g., Will, supra; Carroll* v. *United States*, 354 U.S. 394, 1 L.Ed. 2d 1442 (1957); *Cobbledick* v. *United States*, 309 U.S. 323, 84 L.Ed. 783 (1940).

Despite our appropriate reluctance to employ the mandamus remedy, we conclude that a cumulation of factors causes this case to be of the exceptional and extraordinary nature that justifies the use of the writ. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 13 L. Ed. 2d 152 (1964).[1] The issues presented are basic, they concern the extent of a district court's power under a newly adopted rule of procedure, and they have not been passed on by this court. *See Securities and Exchange Commission* v. *Krentzman*, 397 F.2d 55 (5th Cir. 1968). District courts within the circuit are in conflict over the questions raised in this case, *see United States* v. *Venn*, 41 F.R.D. 540 (S.D. Fla. 1966); *United States* v. *I.G. Balfour Co.*, Crim.

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[1] *See also* Harris v. Nelson, 37 U.S.L. Week 4219 (Sup. Ct. March 24, 1969).

No. 2407 (N.D. Ga. 1967), and the exercise of our "expository and supervisory functions" will limit further disparity. *La Buy* v. *Howes Leather Co.*; *supra*; *Atlass* v. *Miner*, 265 F.2d 312, 313 (7th Cir. 1959), *aff'd* 363 U.S. 641, 4 L.Ed. 2d 1462 (1960). The trial of the present case and similar cases would be lengthy and expensive, causing a heavy burden on the litigants and a drain on judicial manpower. Finally, our sensitivity to the Sixth Amendment considerations is assuaged by the fact that, as noted above, the defendants in this case seek relief and are the only parties who could be benefited by review of these orders. *Madison-Lewis, Inc.* v. *MacMahon*, 299 F.2d 256 (2d Cir. 1962); *compare Will*, *supra*; *In re United States*, *supra*.

In holding that mandamus is appropriate, we issue the same caveat as the Supreme Court did in *Schlagenhauf*. The appropriateness of the writ in this particular instance is not to be construed as making mandamus appropriate in subsequent cases in which the principles of Rule 16 discovery set forth in this opinion are applied. Part of the extraordinary nature of what is before us is the compelling need to settle a new issue so that it can become only an ordinary issue.

2. Rule 16 Motions—Background

While authority construing the newly revised Rule 16 is as yet meager, two decades of debate over the expansion of criminal discovery provides a guide to its interpretation. The revision was prompted in large measure by "the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice." *Dennis* v. *United States*, 384 U.S. 855, 870-71, 16 L.Ed. 2d 973, 984 (1966). In light of the movement toward

liberal criminal discovery as advocated by the commentators[12] and successfully implemented in state courts,[13] we approach problems of construing the Rule with the "realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis v. United States, supra.*

Revised Rule 16 represents a significant change in emphasis. Under the prior practice non-disclosure was the norm,[1] and the defendant had to bear the burden of justifying discovery. *Cf. Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 3 L.Ed. 2d 1323, 1327 (1959). The revised Rule operates

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[12] Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 Wash. U.L.Q. 279; Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 Duke L.J. 477; Garlet, *The Growth of Criminal Discovery*, 1 Crim. L.Q. 3 (1962); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960); Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 Neb. L. Rev. 127 (1962); Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 Calif. L. Rev. 56 (1961); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. Va. L. Rev. 221 (1957); Pennek, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276 (1966); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668 (1962); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964); Symposium, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47 (1963); Note, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940 (1961); Comment, *Discovery By a Criminal Defendant of His Own Grand-Jury Testimony*, 68 Colum. L. Rev. 310 (1968). Authorities are collected in Advisory Committee's Note, 18 U.S.C.A. Rule 16 (Supp. 1969).

[13] *See, e.g.* People v. Chapman, 52 Cal. 2d 95, 338 P.2d 428; State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); *see generally* Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 Stan. L. Rev. 293 (1960).

on the premise that "abuses [of discovery] are a matter of legitimate concern—they argue however not for wholesale prohibition of criminal discovery but for circumspection and for appropriate sanctions tailored to dealing with apprehended abuses in the particular case." Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 Wash. U.L.Q. 279, 292. Under the revised Rule when the defendant properly makes a claim for inspection under 16 (a) (3) or (b), discovery normally will be granted unless special reasons exist justifying the preservation of secrecy. *See United States* v. *Leighton*, 265 F.Supp. 27, 39 (S.D. M.Y. 1967). *United States* v. *Federaman*, 41 F.R.D. 339 (S.D. N.Y. 1967); W. Barron & A. Holtzoff, Federal Practice & Procedure, Rules Ed. § 2033, at 61 (Wright, ed.) (Supp. 1967); Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276, 1277 (1966).

In this case the government has not presented any special circumstances justifying the restriction or denial of discovery. Therefore, the issue before us is whether the defendants put forward proper claims for disclosure under 16(a)(3) and (b).

### 3. The 16 (a) (3) Motions

Under 16 (a) (3) each defendant sought the recorded testimony given before the Los Angeles and Dallas grand juries [14] by named persons said to be

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[14] The indictment returned by the Dallas grand jury related only to the Texas market. The investigation of the Los Angeles grand jury extended to areas other than Texas and Texas as well. The Los Angeles indictments named as defendants United and Earl but not Gifford-Hill-American. United, Earl, and other defendants pleaded *nolo contendere* and the court imposed fines.

employees and former employees of the corporate defendants at the time of giving such testimony.[15]

The court granted the motions of the corporate defendants insofar as they applied to present and former officers,[16] holding that the Rule's provision allowing discovery of "recorded testimony of the defendant before a grand jury" entitled the corporations as a matter of right to discover their officers' testimony.[17] Both the defendants and the government object to the court's ruling, the government claiming that it is too broad, the defendants that it is too narrow.

The government's construction of Rule 16 (a) (2) may be simply stated: the Rule applies only to natural persons; not to corporations—only the testimony of "the defendant" may be discovered, and officers and employees are not defendants but agents of the defendant. The distinction is emphasized by reference to 15 U.S.C.A. §§ 32 and 33 which provide that persons who testify before the grand jury are granted immunity from antitrust prosecution. Thus, the government points out, the officers and employees who testify not only are not defendants but cannot become defendants.

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[15] Some of those whose testimony was sought were alleged by the government to be co-conspirators.

[16] *See* note 6, *supra*.

[17] Rule 16(a)(3) allows the defendant to discover his recorded testimony "before a grand jury." We conclude that under the circumstances of this case the trial court correctly held that the corporate defendants' discovery rights under 16(a)(3) extended to testimony before both the Los Angeles and Dallas grand juries.

[18] Each defendant also moved under Rule 16(a)(1)(C) for any relevant written or recorded statements made by it and now within the possession, custody, or control of the government. None of the parties attack the court's rulings on these motions in the present case, consequently they are not before us.

While the government's argument has the virtue of simplicity, it is misdirected. The revision of Rule 16 was designed to liberalize the prior discovery practice, not restrict it.[29] Moreover categorization is not as simple as the government would have it. The corporation traditionally has occupied an anomalous place in criminal law.[30] Corporations can act only through human agents, and whether in a particular instance the corporation or the agent is acting is a question that may attain almost theological subtlety.

To bolster its restricted interpretation the government argues that because of the threat of economic reprisal after disclosure of their testimony officers and employees may be deterred from furnishing information to the government and from testifying truthfully if they appear as grand jury witnesses.[31] But as Professor Calkins points out,

> A witness is not a confidential informant. He must consider his testimony subject to all the obligations of oath required in any judicial proceeding. In revealing damaging evidence before the grand jury, the witness must expect that such evidence will be disclosed at trial. Therefore, any hesitancy that a witness might have in divulging harmful evidence before the grand jury ordinarily would be based upon a fear of the eventual necessity of giving that same evi-

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[29] The government's construction would foreclose the corporation from all discovery under the revised Rule 16(b). Under the prior rule discovery was freely granted to corporate defendants. *See, e.g.*, Bowman Dairy Co. v. United States, 341 U.S. 214, 95 L.Ed. 879 (1951).

[30] *See, e.g.*, Fletcher, Corporations ch. 55 (rev. ed. 1961).

[31] *See* Comment, *Discovery by a Criminal Defendant of His Own Grand-Jury Testimony*, *supra* note 12, at 337 (1959).

> dence in open court rather than the fear that, having once given such harmful evidence, his grand jury testimony might be divulged. Disclosure of the prior testimony will not unduly discourage free statements by witnesses before the grand jury.

Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 461 (1965).[22] To the extent that the danger does exist, it can be met by appropriate restrictions in the particular case rather than a denial of discovery in all cases. Indeed, Rule 16 (e) was designed to deal with the very evils the government advances. The Advisory Committee's Note states:

> *Subdivision (e).* This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, . . . and the protection of business enterprises from economic reprisals. . . .

18 U.S.C.A. Rule 16 (Supp. 1969).

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[22] Existing laws against intimidating witnesses tend to limit dangers of economic reprisal. Also the presumption that the corporation will retaliate assumes that the corporation will desire its personnel not testify when in fact the corporation, presumed to be innocent of criminal conduct, may have no objection, or may even desire, that its personnel testify. *Cf.* Goldstein, *supra* note 12, at 1192-94. The supposition that the witness will not come forward or testify truthfully disregards the carrot of immunity offered by 15 U.S.C.A. §§ 32-33 and the stick of perjury prosecution if he does not reveal the truth.

Balanced against the possibility of employee coercion are weighty considerations favoring corporate discovery.[23] Restricting discovery is contrary to the supposition that disclosure rather than suppression is preferred. *See Dennis* v. *United States*, *supra*. The corporate defendant does not enjoy the privilege against self-incrimination,[24] which has been described as the *quid pro quo* of limited discovery.[25] In preparing the government's case the prosecutor is able to use the grand jury as his own discovery device, with the subpoenaing of defense witnesses achieving much of the effect of a full-fledged deposition procedure. *See* Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 231 (1964). Finally, the criminal prosecution of corporations, which frequently involves alleged violations of such statutes as the securities and antitrust acts, often

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[23] Mr. Justice Brennan points out that liberalized discovery can benefit the prosecution as well as the defense:

> "And might not expanded discovery benefit the prosecution as well as the accused? If sharpening of the issues, exposure of untenable arguments and more efficient marshalling of the evidence result from discovery, doesn't the prosecution profit? For if voluntary disclosure to defense counsel often results in guilty pleas because defense counsel becomes convinced of the hopelessness of the client's cause, should not a rule authorizing criminal discovery in every case result in even more dispositions without trial? . . . What justifies our being so sure then that according criminal discovery to the accused will benefit only the accused at the expense of the state?"

Brennan, *supra* note 12, at 287-88.

[24] Essgee Co. v. United States, 262 U.S. 151, 67 L.Ed. 917 (1923); Wilson v. United States, 21 U.S. 361, 55 L.Ed. 771 (1911); Hale v. Henkel, 201 U.S. 43, 50 L.Ed. 652 (1906).

[25] United States v. Garson, 291 F. 646, 649 (S.D. N.Y. 1923) (L. Hand, J.); *but see* Goldstein, *supra* note 12.

resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth.

Four district courts which have ruled on the question have agreed with the conclusion that corporate defendants are entitled to discovery under 16 (a) (3). But they have differed over the question of whose testimony the corporation may discover. In the present case the testimony of officers and former officers was held discoverable.[26] In *United States* v. *Acroquip Corp.*, 41 F.R.D. 441 (E.D. Mich. 1966), discovery of the testimony of officers and of corporate representatives who testified in response to subpoenas addressed to the corporation was granted. The court in *United States* v. *I. G. Balfour Co.*, Crim. No. 2407 (N.D. Ga. 1967) allowed the corporation to reach the testimony of all officers, directors and managing agents. In *United States* v. *Vonn*, 41 F.R.D. 540 (S.D. Fla. 1966), the testimony of all officers, directors, agents, and employees, but not former employees, was held discoverable.[27]

In our view these decisions focus too sharply on categorizations of corporate spokesmen that are not necessarily related to considerations underlying a meaningful right of discovery. The significance of a witness' testimony to the inquiry into potential corporate criminal liability, and to the defense in pre-

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[26] *See* note 6, *supra*.

[27] As we pointed out in our prior opinion in this case, the decision in *Vonn* was based on discretionary factors as well as the trial court's construction of Rule 16(a)(3). 388 F.2d at 238-39.

In United States v. Socony Mobil Oil Co., Crim. No. 837 (D. Kan. 1966) the court granted the corporate defendant discovery of the testimony of a corporate employee alternatively under 16(a)(3) and 16(b).

paring its case, does not depend upon organizational charts. What all the participants—parties, counsel, grand jury, and trial jury if there be one—want to ascertain is what the witness knows, whether it is competent, and what probative value it has on the issues. The non-officer may play a more significant role in the corporation's actions under inquiry than an officer.[25] If the door to Rule 16 (a) (3) is to be open to corporations at all—and we are of the opinion that it must—its availability should not be based upon corporate titles. Similarly, the fact that a witness has terminated his connection with the corporation after the relevant events have occurred does not bear on the significance of his testimony.

In articulating limits for corporate discovery under Rule 16 (a) (3) we bear in mind both theoretical considerations and practical limitations. The discovery rights of the corporation must be reasonably related to corporate activity. Thus, the testimony of an employee that he saw a transaction on a public street on his day off should not be automatically discoverable by the corporate defendant. Similarly, a witness who had no connection with the corporation at the time the relevant events occurred should not be brought within the purview of 16 (a) (3) by being put on the corporate payroll on the day that he testifies. On the other hand, limitations on the corporation's discovery rights must be practicably com-

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[25] The grand jury indictment in this case charged conspiracy to restrain trade in the Texas market. The non-officer employees to whose testimony access has been denied under the 16(a) (3) order include the general manager of Texas operations for United during the period covered by the indictment, a Texas salesman, superintendent, and office manager of United, United's chief estimator, and several of Gifford-Hill-American's salesmen, managers, and estimators.

mensurate with the efficient utilization of the energies of counsel and the court. A test that necessitated a detailed inquiry by the trial judge into a voluminous record would not be satisfactory.[29]

We hold that under Rule 16 (a) (3) the defendant corporations may discover the testimony of all present and former officers and employees concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to their employment.[30] In so holding, we reiterate that if circumstances exist justifying the denial, restriction, or deferral of discovery in the particular case, the government may seek appropriate orders under Rule 16 (e). We also acknowledge that in those unusual cases where special circumstances pointing toward the denial or restriction of discovery exist, the determination of whether the interests of justice favor disclosure may necessitate a delicate balancing of opposing considerations, and appropriate deference will be accorded by this court to the trial judge's determinations. *See* Symposium, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 65 (remarks of Mr. Justice Brennan). Finally, we recognize that under the revised Rule the trial judge retains discretion in regulating such incidents of discovery as the time,

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[29] For this reason we reject the test proposed in Comment, *Discovery by a Criminal Defendant of His Own Grand Jury Testimony*, *supra* note 12, at 329-33, that a corporate defendant be permitted to discovery "testimony given by any member or former member of the corporate organization, where the testimony concerns alleged conduct of that member for which the prosecution seeks to hold the defendant criminally responsible."

[30] It is our view that the responsibility should be on the government to show that all or part of testimony sought falls outside these limits.

place, and manner of disclosure so as to assure the orderly progress of litigation.

4. The 16 (b) motions

Rule 16 (b) discovery motions were filed by United and Earl and by Gifford-Hill-American seeking an order directing the government to permit them to inspect and copy or photograph all books, papers and documents in the possession, custody or control of the government relating to the subject matter of the indictment, including but not limited to documents submitted to the Los Angeles and Dallas grand juries by Weyerman and Greenway (former executives of United) and the transcripts of all testimony given before the Los Angeles and Dallas grand juries.

In support of their motions the defendants filed affidavits and lengthy memoranda detailing the bases of their requests. United and Earl stated that some of the documents submitted to the grand juries contained details of the various purported illegal agreements, and that, while they had duplicates of some of the documents, inspection of the originals was required to determine their authenticity. They stated that since Weyerman and Greenway had been named as co-conspirators under the Dallas indictment, their acts and declarations would be admissible against the defendants. Finally, they claimed a need for the Los Angeles grand jury transcript in order to prepare a possible defense of double jeopardy.[1]

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[1] United and Earl contended that many of the witnesses who had testified before the Los Angeles grand jury subsequently testified before the Dallas grand jury, and that they needed the Los Angeles grand jury transcript to ascertain if the alleged Texas conspiracy was merely an extension of the conspiracy for which they already had been convicted.

Gifford-Hill-American's memorandum and supporting affidavit specified a need for the documents submitted by Weyerman and Greenway in order to discover the declarations of these two alleged co-conspirators, and a need for other documents submitted to the Dallas grand jury in order to authenticate documents in Gifford-Hill-American's possession.

The court granted both motions with respect to documents submitted by Weyerman and Greenway to the Los Angeles grand jury [32] and by all witnesses to the Dallas grand jury, "except that this Order does not authorize disclosure of such documents which are not material to proof of the conspiracy alleged in the indictment or which deal with collateral matters which may possibly arise at trial." [33] In other respects the motions were denied.

The government does not challenge the order insofar as it directs the production of documents submitted to the grand juries. But the defendants maintain that the trial judge erred in failing to make available all material documents in the government's possession and in restricting discovery, where granted, to items relevant to the proof of the conspiracy.

First we consider documents other than grand jury transcripts. Unlike Rule 16 (a), Rule 16 (b) imposes as a prerequisite to discovery the requirement that there be a showing of materiality to the prepa-

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[32] By the court's order under Rule 6(e) the defendants have been granted access to the Los Angeles grand jury testimony of Weyerman and Greenway, as well as all officers of United and Gifford-Hill-American.

[33] The order also exempted from disclosure internal government documents made by government agents in connection with the investigation or prosecution of the case and statements of government witnesses or prospective witnesses covered by the Jencks Act, 18 U.S.C.A. § 3500. (Supp. 1969).

ration of the defense and of reasonableness. Because the defendant cannot be expected to know the exact nature of what he has not yet seen, specific designation is not required. *See* Advisory Committee's Notes, 18 U.S.C.A. Rule 16 (Supp. 1969). If the documents in the possession of the government are voluminous the defendant need not lay a detailed foundation of materiality for each item. *United States* v. *Fancher*, 195 F.Supp. 449, 450 (D. Conn. 1961); *United States* v. *Greater Blouse, Skirt & Neckwear Contractors Ass'n*, 177 F.Supp. 213 (S.D. N.Y. 1959); *cf. Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 95 L.Ed. 879 (1951). However, there must be a definite delineation of the subject matter sought. A blanket demand for "all material information in the possession of the government" does not suffice to establish materiality. *See* Barron & Holtzoff, *supra* at 2033 (Supp. 1967); Rezneck, *supra* at 1289; *cf. People* v. *Cooper*, 53 Cal. 2d 775, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 Calif. L. Rev. 56, 83-84 (1961).

The shotgun motions of the defendants did not comply with these requirements, and the trial judge did not err in refusing the defendants' requests for "all material documents."[1] However, the materiality that must be shown is materiality to the preparation of the defense, not materiality to proof of the

[1] The defendants did attempt to delineate a need for the production of documents submitted to the Los Angeles grand jury by Wilson, a former United employee. However, the defendants have not contended that Wilson is an alleged co-conspirator and do not otherwise show sufficiently how his testimony would be material to the preparation of the defense. From the record before us we cannot conclude that the trial court erred in denying discovery of documents submitted by Wilson.

conspiracy." The court's order should be modified to apply the correct materiality standard.

We turn now to grand jury transcripts. The government's opposition to the defendants' discovery of grand jury transcripts rests primarily on the contention that Rule 16 (b) does not apply to grand jury transcripts. The government says that revised Rule 16 (b) is a restatement of former Rule 16,[36] under which grand jury transcripts were not discoverable. This disregards the fact that the old version of Rule 16, unlike the revised Rule, restricted discovery to items "obtained from or belonging to the defendant or obtained from others by seizure or process." The government also argues that reading the discovery provisions of Rule 16 in conjunction with the provisions of Rule 6 relating to grand jury proceedings precludes grand jury transcripts from discovery under 16 (b). We find nothing on the face of either

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[35] As Rezneck points out, the revised Rule "does not limit the defendant to discovering the case against him. It evidently contemplates that his discovery may encompass a search for evidence which he may use to support his own case or to impeach the government's." Rezneck, *supra* note 12, at 1279. See also United States v. Greater Blouse, Skirt & Neckware Contractors Ass'n, 177 F. Supp. 213 (S.D. N.Y. 1959).

[36] The former version of Rule 16 provided:

> "Upon motion of a deefndant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

rule that commands this result.[37] Rule 16 (b) permits the court to allow the defendant to inspect and copy "books, papers, documents, tangible objects, buildings or places . . . ." Grand Jury transcripts are "documents." *Cf. Fryer* v. *United States*, 207 F.2d 134, 136-37 (D.C. Cir. 1953). Rule 6 (e) prohibits the disclosure of grand jury transcripts except by order of the court, but its provisions do not delimit when such orders should or should not be made in discovery proceedings.[38]

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[37] The government maintains that the caption of Rule 16(b), which indicates that the subdivision applies to "*other* Books, Papers, Documents, Tangible Objects or Places," suggests that 16(b) applies to documents other than grand jury transcripts, which are dealt with in 16(a)(3). However it is more in keeping with the language of 16(a)(3) to read the caption of 16(b) as meaning "other than the grand jury testimony of *the defendant*."

[38] "*Rule 6. The Grand Jury.*

* * * *

"(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

Finally, the government urges that the requirement of "particularized need" as enunciated in cases construing Rule 6 (e) prior to the amendment of Rule 16 [9] is an implied limitation on a defendant's discovery rights under Rule 16. However, the draftsmen of the revised Rule were careful to make exceptions to its otherwise all-inclusive provisions for items subject to discovery under the Jencks Act and for internal government reports and memoranda. It is improbable that an exception to Rule 16 (a) for the statutory discovery provisions of the Jencks Act would be specifically mentioned while an exception for the judicially developed doctrine under Rule 6 (e) of discovery based on particularized need would be included only by implication. The government emphasizes strongly the "long established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681, 2 L.Ed.2d 077, 1961 (1958).[10] Access to grand jury transcripts like all discovery in criminal cases traditionally has been restricted,[11] but there has been a growing tendency

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[9] *See* Dennis v. United States, 384 U.S. 855, 16 L.Ed.2d 973 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 3 L.Ed.2d 1348 (1959); United States v. Procter & Gamble Co., 356 U.S. 677, 2 L.Ed.2d 1077 (1958).

[10] On discovery of grand jury documents in civil antitrust cases, *see* State of Illinois v. Harper & Row Publishers, Inc., Civil No. 67C1899 (N.D. Ill. 1968), petition for writ of mandamus refused sub nom. Harper & Row Publishers, Inc. v. Decker, 7th Cir., 1969 ___ F.2d ___ [No. 17329 January 9, 1969], *cert. denied* 37 U.S.L. Week 3368 (April 1, 1969), holding that plaintiffs in a treble damage suit may discover grand jury documents under Fed. R. Civ. P. 26 upon alleging relevance and materiality rather than particularized need.

[11] Between the adoption of Fed. R. Crim. P. 6 (e) in 1946 and the July 1, 1966 amendment of Rule 16, discovery of grand

to limit secrecy after the grand jury has completed its work to those cases where secrecy serves legitimate policy considerations. *See Dennis v. United States, supra; United States v. Youngblood, supra;* Calkins, supra, Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668 (1962).[42]

Factors arguing for secrecy[43] do not necessitate the restrictive construction of Rule 16 (b) urged by the government. The prevention of accused's arrest is not a consideration at the pre-trial discovery stage. Protection of individuals not indicted is a limited problem at pre-trial—if no indictment is returned there is no disclosure, and if some persons are indicted and some are not testimony concerning persons not indicted can be deleted if not material to preparation of the defense. The dangers arising from possible intimidation of witnesses have been discussed

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jury transcripts was more readily available than discovery of most other items. Under 6(e), discovery of grand jury transcripts was granted whenever "particularized need" was shown. *See* Dennis v. United States, 384 U.S. 855, 16 L.Ed. 2d 973 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 3 L.Ed. 2d 1323 (1959). The only other provisions allowing discovery applied in the narrow circumstances specified in the Jencks Act, 18 U.S.C.A. § 3500 (Supp. 1967) and in former Rule 16. *See* note 36, *supra*.

[42] Some states have gone so far as to eliminate post-indictment grand jury secrecy altogether. *See* Cal. Pen. Code § 938.1 (West Supp. 1967); Iowa Code Ann. § 772.4 (1950); Fed. R. Crim. P. 5.16 (1961); Minn. Stat. Ann. § 628.04 (1964); Ch. 196, § 95-1406(e), [1967] Mont. Laws 395; Okla. Stat. Ann. tit. 22, § 340 (Supp. 1967).

[43] *See, e.g.*, Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405, 3 L.Ed. 2d 1323, 1330 (1959) (Brennan, J., (dissenting opinion). United States v. Youngblood, 379 F.2d 363, 370 n.3 (2d Cir. 1967).

in an earlier section of this opinion. *See* text at note 22, *supra*. Discovery need not compromise the grand jury's deliberative process, since the deliberations and notes of the grand jury, as opposed to testimony, may not be material and if material may be the subject of protective orders where appropriate."

In circumstances where nondisclosure serves legitimate ends, the judge is allowed under 16 (e) to deny, restrict, or defer discovery and the government is permitted to seek appropriate restrictive orders. Only where secrecy does not serve legitimate, overriding purposes is discovery of grand jury transcripts mandated by the Rule. Moreover, in cases where disclosure of grand jury transcripts to the defendant is appropriate, discovery need not be a one-way street, for Rule 16 (c) authorizes the court to condition its discovery order in favor of the defendant on the defendant's allowing the government access to items material to the preparation of the government's case.[45]

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[44] Moreover Rule 6(e) suggests that the grand jury's deliberations and the vote of any juror are not subject to discovery. *See* note 38, *supra*.

[45] "*Rule 16. Discovery and Inspection.*

"(c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery

Turning to the present case, discovery to ascertain the existence of double jeopardy fits well within the Rule 16 (b) requirement of materiality to the preparation of the defense. According to the defendants' allegations, the Los Angeles grand jury has completed its work, therefore production of its transcript in the Texas District Court would not appear unreasonable.[16] Unless the government shows that the information regarding possible double jeopardy can be obtained from other sources,[17] or that portions of the grand jury transcripts do not bear on the double jeopardy issue, or that a denial, restriction, or deferral of discovery of all or part of the transcripts is otherwise appropriate, United and Earl's motion for the production of grand jury transcripts should be granted.[18]

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or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

[16] The prior discovery orders by Judge Hughes relating to the Los Angeles grand jury transcript have been conditioned upon the approval of the United States District Court for the Southern District of California. Similar conditions in future discovery orders are, of course, appropriate.

[17] *See* Rezneck, *supra* note 12, at 1220: "A request for items material to the preparation of the defense would ordinarily be reasonable unless, for example, the defendant already had some access to the matters sought."

[18] Gifford-Hill-American does not contend that it faces double jeopardy, and it has not otherwise shown a need for the production of the transcript.

5.

The defendants' petitions for writs of mandamus are GRANTED. The defendants are entitled to be allowed the discovery sought by them to the extent provided by this opinion.[10] However, the government may, if it desires, present to the district judge appropriate motions under Rule 16 (c) and 16 (e).

WRIT GRANTED.

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[10] The defendants complain that the trial court's discovery orders are unclear in several respects. We do not deal with these contentions in this mandamus proceeding. If the orders are unclear, the defendants can seek clarification from the district court.

## APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 24101

---

UNITED STATES OF AMERICA, PETITIONER

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

---

No. 24120

---

GIFFORD-HILL-AMERICAN, INC., PETITIONER

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

---

No. 24121

---

UNITED CONCRETE PIPE CORPORATION
and LLOYD R. EARL, PETITIONERS

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

---

No. 24147

UNITED STATES OF AMERICA, PETITIONER

*versus*

HONORABLE TED CABOT, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT

*On Petitions for Writs of Mandamus, United States District Court, for the Northern District of Texas, and the Southern District of Florida.*

(January 5, 1968.)

Before BROWN, Chief Judge, COLEMAN and GODBOLD, Circuit Judges.

BROWN, Chief Judge: These are four cases, three from Texas and one from Florida, presenting essentially the same problem—the application of F.R. Crim.P. 16(a)(3) (as amended Feb. 28, 1966, effective July 1, 1966). See 39 F.R.D. 168 et seq. Specifically, the question is narrowed down to whether in allowing production of the "recorded testimony of a defendant" the term "defendant" includes (1) an executive officer of a corporate defendant, (2) an employee of a corporate defendant, and (3) a former employee of a corporate defendant in a criminal antitrust case, each of whom has given recorded testimony before a grand jury.[1] In the Dallas cases the

[1] F.R.Crim.P. 16(a)(3) "Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the Court may order the

District Judge ruled as a matter of law that the term did include executive officers of the corporate defendant, but not employees either current or former. The Court held the rule gave an absolute right to production without a showing of need. The Government filed a petition for mandamus to test the correctness of that ruling and the defendants filed a cross petition asserting that the term "defendant" includes as well the employees and former employees who testified. In the Florida case, the Judge granted discovery of the testimony of the corporate officers and present employees, but declined to grant production as to former employees. The Government likewise seeks mandamus.

Upon the showing of the Government in each of these cases, this Court in a series of Orders under its Rule 13a authorized the filing of the petitions and ordered that answers be filed by the Respondents. Extensive answers have been filed along with full briefs.[2] We do not at this time determine whether mandamus is available or an appropriate remedy to determine the questions presented. Viewing these cases on the Government's motion to consolidate or for consolidated argument, we conclude that mandamus ought not to be issued in the Miami, Florida case, but that the Texas cases should be set down for argument.

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attorney for the government to permit the defendant to inspect and copy or photograph any relevant * * * recorded testimony of a defendant before a grand jury."

[2] As the Rule and better practice contemplates, the respective District Judges take a neutral position. The contestants before us are, as they should be, the Government as the prosecutor and the corporate Defendants in the criminal cases.

## The Miami Case

The Order of Judge Cabot with its supporting reasons reflects on its face that the Defendants there sought discovery of Grand Jury testimony under F.R.Crim.P. Rule 6(e) and 16(a)(3). But unlike the Texas cases in which the demand for production was based on F.R.Crim.P. 16(a)(3) as a matter of right, these Defendants undertook to demonstrate that both on F.R.Crim.P. 6(e) and general principles of fairness, due process, and constitutional rights, the Court should grant the discovery. The Court then ordered production of the Grand Jury testimony of officers, directors, agents and employees (but not former employees) and stated, "This ruling is founded upon: (1) the inherent power of the judge to manage a trial so as to achieve a fair and expeditious result; (2) Rule 6(e) * * * which permits the judge to authorize the production of any Grand Jury proceedings preliminarily to trial; (3) Rule 16(a)(3), which permits production of the defendants' grand jury testimony prior to trial; and (4) the case of Dennis v. United States, 34 L. W. 4556 (1966)."

Although F.R.Crim.P. 16(a)(3) is referred to, and perhaps as the source of additional discretion, it is perfectly clear that Judge Cabot did not rule, nor

The Court prefaced his rulings by stating: "A fair trial means that the facts and issues are to be approached openly and honestly. In order to sift the wheat from the chaff in this case, maximum pretrial discovery and a clarifying organization of the thousands of documents is essential. Without it there will be no trial; there will be one long confused shuffling of words and papers. Difficult and complex trials call for liberal use of the judge's discretion in managing the trial. Consequently, this ruling is based upon the peculiar facts at bar, and makes no attempt to formulate guidelines for future rules." [see Record red-backed appendix p. 29]

does his holding presage a ruling, that the corporate Defendant is entitled as a matter of right to the testimony of any existing or former officer, director or employee. On the contrary, it is clear that the Judge was influenced largely by discretionary factors including fundamental fairness of the very kind which led the Supreme Court in the then recent *Dennis* case to reverse criminal convictions for failure to allow discovery of Grand Jury testimony of key witnesses.[1] It was also based on the application of F.R.Crim.P. Rule 6(e), which allows a production on a showing of "particularized need." *See United States* v. *Procter & Gamble Co.*, 1958, 356 U.S. 677, 681, 78 S.Ct. 983, 2 L.ed 2d 1077; *Pittsburgh Plate Glass Co.* v. *United States*, 1959, 360 U.S. 395, 79 S.Ct. 1237, 3 L.ed 2d 1323; see also *United States* v. *Schoeneman*, D.D.C., 1962, 203 F.Supp. 840; *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce*, 5 Cir., 1963, 323 F.2d 233. Included also are perhaps implications of *Brady* v. *Maryland*, 1963, 373 U.S. 83, 83 S.Ct. 1194, 10 L.ed 2d 215; *cf*, *United States* v. *LaValle*, 2 Cir., 1965, 344 F.2d 313.

Although Judge Cabot took some account of the new Rule 16(a)(3) as apparently another marker toward the goal of greater, not less, disclosure of the adversary's facts in criminal cases, it does not, as the Government contends, even begin to approach any

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[1] Dennis v. United States, 1966, 384 U.S. 855, 86 S.Ct. 1840, 16 L.ed. 2d 973. This was followed by four per curiam decisions vacating judgments and remanding for reconsideration in the light of *Dennis*. Leon v. United States, 1966, 384 U.S. 882, 86 S.Ct. 1949, 16 L.ed. 2d 999; National Dairy Products Corp. v. United States, 1966, 384 U.S. 883, 86 S.Ct. 1913, 16 L.ed 2d 995; Lucignano v. United States, 1966, 384 U.S. 884, 86 S.Ct. 1917, 16 L.ed 2d 997; Worthy v. United States, 1966, 384 U.S. 894, 86 S.Ct. 1961, 16 L.ed 1000.

ruling in absolute terms as a matter of right. No sharp, clear-cut construction, interpretation or application of 16(a)(3) has been made. The Judge's Order of production was a mixture of subtle discretionary factors. The record does not even remotely suggest an abuse of discretion even assuming the Orders might ultimately be held to have been erroneous in the sense of being incorrect. A writ of mandamus is not appropriate. *Will* v. *United States*, 1967, ..... U.S. ....., 88 S.Ct. ....., 19 L.ed 2d 305 [No. 36 Oct. term, 1967, Nov. 13, 1967.] There was no abuse of discretion and therefore the application for a writ of mandamus is DENIED. See *Roche* v. *Evaporated Milk Association*, 1943, 319 U.S. 21, 63 S.Ct. 938, 87 L.ed 1185 in contrast to *Ex Parte United States*, 1932, 287 U.S. 241, 53 S.Ct. 129, 77 L.ed 283; *United States* v. *Mayer*, 1914, 235 U.S. 55, 35 S.Ct. 16, 59 L.ed 129; *United States* v. *Smith*, 1947, 331 U.S. 469, 67 S.Ct. 1330, 91 L.ed 1610; 6 Moore Federal Practice ¶ 54.10(2) at p. 69-70.

## Dallas Cases

Unlike the Miami case, in the Dallas cases Judge Hughes based production entirely on Rule 16(a)(3) as a *matter of right*. There was no showing for, or determination of, any particularized need either in the pre-or post-*Dennis-Brady* v. *Maryland*-sense as discussed above in connection with the Miami case. Her ruling was unfavorable to both Government and the Defendants. Production was limited to executive officers only, and excluded employees, either present or former. The Defendants cross petitioned to the exclusion of employees as well as to the condition imposed that forbade one Defendant disclosing to other Co-Defendants (or counsel) the Grand Jury testi-

mony of that particular corporation's officers.[5] We conclude that we should set down the decisions for further briefs and argument. One of the issues which must be briefed and argued in these cases is whether the Trial Judge's determination that production was approved as a matter of law, rather than as a matter of discretion, affects the availability or appropriateness of mandamus. Stated differently this question concerns whether mandamus is appropriate or available to secure a ruling on the legal issue until such time as the parties have sought from the Trial Court production on discretionary principles and the Trial Court has refused to grant such relief in whole or in part on such principles to any extent.[6]

We make these comments because we get the distinct impression that the Trial Judge, both sides, indeed all of the lawyers in that irrepressible quest for determination of nice, neat, legal, issues, anxiously, if not unwittingly, press us for a clean cut decision which might not be ripe at this time. Of course, on the surface of things, one might plausibly argue that the Trial Judge's granting of discovery *as a matter of right* as to some witnesses (executives) and deny-

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[5] The cross petitions complained also of refusal to order production of (i) employees' testimony as a document and (ii) documents considered by the Grand Jury but not produced by witnesses before the Grand Jury under Rule 16(b). The contention as to (i) is pertinent to the 16(a)(3) problem. Item (ii) is a matter open for review by the Defendants after conviction and doubt as to appropriateness or availability of mandamus is perhaps greater.

[6] Since these are original proceedings, not appeals which might supersede the power of the District Court during the pendency of the appeal, the Trial Court is free to entertain any such applications for discretionary production if sought. The results could be certified to this Court by a supplemental original record.

ing it as to others [illegible] past and present, is a holding that on no other basis would preclusion of the testimony of any one or more or all of the specified witnesses be ordered by the Trial Judge. But without even intimating what the Court's ultimate decision would be — either in this proceeding or in any appeals from judgments of conviction — it is certainly possible that were the final decision of this Court or the Supreme Court to be that preclusion of testimony of any or all of these witnesses in these several categories is not discretionary but a matter of *right* under Brady, this careful Trial Judge following and applying Dennis, Brady, and the other cases allowing discovery for particularized need, might well grant it as to one or more or all of such persons on a showing. We emphasize that we make no prejudgment whatsoever in this respect and point it out simply to assure full briefing and argument on the possibility that, whatever the ultimate decision herein, some or all discovery will be allowed.

The Clerk will assign the Dallas cases for argument and fix the schedule for filing supplemental briefs which are required herein.

## APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Crim. No. 3-690

UNITED STATES OF AMERICA

v.

UNITED CONCRETE PIPE CORPORATION ET AL.
DEFENDANTS

### PRE-TRIAL ORDER

On September 1, 1966 came on to be heard the motions of the defendants United Concrete Pipe Corporation, Lloyd R. Earl, and Gifford-Hill-American, Inc. for discovery under Rule 16 of the Federal Rules of Criminal Procedure. Came the Government by and through its attorney. Came the defendants by and through their attorneys. The Court heard the motions and arguments of counsel for all parties, and being of the opinion that such motions should be granted in part,

It is ordered that:

1. Paragraph 1 of the motion of the defendant United Concrete Pipe Corporation as to officers of the corporation is sustained, and as to Lloyd R. Earl is hereby denied.

2. Paragraph 2(a) and (b) of the motion of the defendants United Concrete Pipe Corporation and Lloyd R. Earl as it applies to the documents of William C. Weyerman and William W. [illegible] and those of other witnesses who testified before the Dallas grand jury is granted, except that the order [illegible]

not authorize disclosure of such documents which are not material to proof of the conspiracy alleged in the indictment or which deal with collateral matters which may possibly arise at trial. In other respects it is denied.

[1] 3. Paragraph 3 of the motion of the defendant United Concrete Pipe Corporation is denied, except as to the transcripts of grand jury testimony of the following corporate officers of United: Richard I. Young, Russell Bergemann, George Curtis, and William Greenway. The Court holds that under Rule 16(a)(3) of the Federal Rules of Criminal Procedure a corporate defendant in a criminal antitrust action is entitled, without a showing of particularized need, to inspect the grand jury transcripts of testimony of its officers. The Government shall permit the defendant United Concrete Pipe Corporation to inspect and copy at the office of the United States Attorney in Dallas, Texas, the recorded testimony taken before the Los Angeles and Dallas grand juries of all officers of the said defendant corporation, to wit, Richard I. Young, Russell Bergemann, George Curtis, and William Greenway.

4. Paragraph 1 of the motion of the defendant Gifford-Hill-American, Inc. is sustained as to officers of the corporation.

5. Paragraph 2 of the motion of the defendant Gifford-Hill American, Inc. is hereby denied, except as to the transcript of testimony of the following corporate officer of Gifford-Hill-American, Inc.: Charles B. Clinger. The Court holds that under Rule 16(a)(3) of the Federal Rules of Criminal Procedure a corporate defendant in a criminal antitrust action is entitled, without a showing of particularized need, to inspect the grand jury transcripts of testimony of its officers. The Government shall permit the defend-

ant Gifford-Hill-American, Inc. to inspect and copy at the office of the United States Attorney in Dallas, Texas, the recorded testimony taken before the Los Angeles and Dallas grand juries of all officers of the said defendant corporation, to wit, Charles B. Clinger.

6. The disclosure of testimony and documents received by the Los Angeles grand jury which is provided by this order, is subject to approval of the United States District Judge of the Southern District of California.

7. The grand jury transcripts and documents which each defendant corporation is permitted to see by this order are not to be removed from the office of the United States Attorney in Dallas except for copying, and shall only be made available to the respective defendant corporation and its attorneys of record, shall be used solely for the purpose of preparation for and trial of this case, and shall not be made available to any other defendant or its attorneys.

[2] 8. This order does not require the disclosure of reports, memoranda, and other internal Government documents made by Government agents in connection with the investigation or prosecution of the case or of statements made by Government witnesses or prospective Government witnesses to agents of the Government as provided in 18 U.S.C. § 3500.

9. The documents and grand jury transcripts herein ordered to be produced for inspection shall be sent by the Government to the office of the United States Attorney at Dallas, Texas, to be there held until time of trial. The described grand jury transcripts ordered to be produced under paragraphs 4 and 6 of this Order shall be produced on September 22, 1966. The documents to be produced under paragraphs 1 and 5 of this Order shall be produced on October 1, 1966.

10. The exhibits to be used by any party at the trial of this case shall be marked for identification prior to trial.

11. The parties are to submit to the Court four days prior to trial any questions which the party desires to have the Court ask the jury panel on voir dire.

12. Requested instructions are to be submitted to the Court one week before the trial, together with supporting authorities.

13. During the trial the Government and defendants shall on the afternoon of the day preceding the testimony of a witness provide to each other a list of the names of all witnesses expected to be called to testify on the following day.

14. The trial of this case is to commence on November 7, 1966, at 10:00 o'clock A.M.

15. In the event that the Government seeks review of paragraphs 3 and 5 of this Order by the Court of Appeals, compliance with these two paragraphs shall be stayed until after ruling by the appellate court.

Dated, this 19th day of September, 1966.

SARAH T. HUGHES
United States District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Criminal Action No. CR-3-690

UNITED STATES OF AMERICA

*v.*

UNITED CONCRETE PIPE CORPORATION; GIFFORD-HILL-AMERICAN, INC.; and LLOYD R. EARL, DEFENDANTS

ORDER

On January 18, 1968 came on to be heard the Additional Motion for Discovery and Inspection by defendants United Concrete Pipe Corporation and Lloyd R. Earl and the Motion of Defendant Gifford-Hill-American, Inc., for Discovery and Inspection under Rule 6(e) and Rule 16(b), both filed herein on January 16, 1968. The United States came by and through its attorneys. The defendants came by and through their attorneys.

The Court heard the motions and arguments of counsel for all parties and being of the opinion that such motions should be granted in part:

IT IS ORDERED that:

1. The Court finds that under Rule 6(e) of the Federal Rules of Criminal Procedure there is a particularized need for production, for inspection and copying of the grand jury transcripts of testimony before the Los Angeles and Dallas grand juries of the following persons:

1. Richard I. Young
2. Russell Bergemann
3. George Curtis
4. William Greenway
5. Charles B. Clinger
6. William C. Weyerman
7. James R. Wilson

2. The Court finds that under Rule 6(e) there is no particularized need for production for inspection and copying of the grand jury transcripts of the following persons designated in the said defendants' Additional Motions for Discovery and Inspection:

1. Jim Mitchell
2. Victor Waisman
3. John Fenton
4. Fred Day
5. James Watts
6. K. D. Bobkoff
7. Herbert Rule
8. Walter H. Swank
9. Cecil White
10. James H. Bailey
11. Dick Granger
12. Bill Knight
13. George D. Francis

3. The Government shall permit the defendants, within 30 days of the final ruling of the Fifth Circuit Court of Appeals on the mandamus petitions Causes Nos. 24101, 24120 and 24121, now pending in that court, to inspect and copy at the office of the United States Attorney in Dallas, Texas, the transcripts of testimony set out in Paragraph 1 of this order.

4. The grand jury transcripts and documents which each defendant is permitted to see by this order are not to be removed from the office of the United

States Attorney in Dallas except for copying, and shall only be made available to the respective defendant and its attorneys of record, and shall be used solely for the purpose of preparation for and trial of this case. The provision in Paragraph 7 of the order entered herein on September 16, 1966 reading "and shall not be made available to any other defendant or its attorneys" is hereby stricken and vacated.

5. Forty-eight hours prior to the date of commencement of the trial in this matter the Government shall furnish to defendants for inspection and copying the grand jury transcripts of testimony of all witnesses expected to be called to testify for the Government. If the Government decides during the trial of this case to call any additional witnesses, it shall promptly furnish to defendants for inspection and copying the grand jury transcript of such witnesses after its decision to call such witnesses. These transcripts shall be provided to the defendants under the same conditions stated in Paragraph 4 of this order.

6. The disclosure of the transcripts of testimony received by the Los Angeles grand jury which is provided by this order, which have not been heretofore authorized by the United States District Court for the Southern District of California, is subject to the approval of that court.

Dated at Dallas, Texas, this —— day of January 1968.

ENTER:

SARAH T. HUGHES
United States District Judge

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SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

October Term, 1969
No. 515

Supreme Court, U.
FILED
OCT 24 1969
JOHN F. DAVIS, CLERK

UNITED STATES OF AMERICA and HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE for the NORTHERN DISTRICT of TEXAS,
*Petitioners,*

*vs.*

GIFFORD-HILL-AMERICAN, INC., UNITED CONCRETE PIPE CORPORATION and LLOYD R. EARL,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

# Supreme Court of the United States

October Term, 1969
No. 515

UNITED STATES OF AMERICA and HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS,

*Petitioners,*

*vs.*

GIFFORD-HILL-AMERICAN, INC., UNITED CONCRETE PIPE CORPORATION and LLOYD R. EARL,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents* accept Petitioners' Jurisdictional Statement, Presentation of Questions, and Statement of the Case. For ease of reference we include the final opinion of the Court of Appeal as an Appendix pp. 11-38. To Petitioners' recitation of the Rules Involved we add the full text of Rule 16(b) due to a significant omission by the Government. In addition, we do not agree that review by this Court is either necessary or appropriate.

*Respondents in these proceedings are United Concrete Pipe Corporation and Gifford-Hill-American, Inc. Lloyd R. Earl, described in the caption, is no longer a party to these proceedings, the indictment against him having been dismissed on March 14, 1968.

## Rules Involved.

Federal Rules of Criminal Procedure

"16(b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500."

Fed. R. Crim. P., 18 U.S.C.A. Rule 16(b).

## REASONS FOR DENYING THE WRIT.

### The Decision of the Court of Appeals Is Fully Consistent With the Expanded Concept of Discovery in the Criminal Setting Expressed by the Adoption of the Revised Rules of Criminal Procedure by This Court.[1]

While we do not take issue with the Petitioners' statement of the questions before the Court, we prefer to discuss them in reverse order, taking the application of subdivision 16(a)(3) first, followed by subdivision 16(b). This approach is more logical and does not destroy the internal consistency of the Rule. Rule 16-(a)(3) provides for discovery of specific items by the defendant. This is followed by Rule 16(b) which provides for discovery of "other" books, papers, documents, etc. It is meaningless to talk of "other" items under 16(b) without first determining what is made subject to discovery under 16(a)(3).

1. The holding by the Court of Appeals that these corporate defendants "may discover [under Rule 16-(a)(3)] the testimony of all present and former officers and employees concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to their employment"[2] is clearly correct.

The Government has retreated from the indefensible position taken below that corporate defendants are not entitled to any discovery under Rule 16(a)(3) because the "corporation" does not itself testify. The

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[1]383 U.S. 1087 (1966).

[2]App. p. 28. References to the June 2, 1969 opinion of the Court of Appeals will be to App. p. .... of this brief. References to the Government's Petition for Writ of Certiorari will be to Pet. p. .....

Government would have limited discovery to natural persons although discovery was freely granted to corporate defendants under the prior, more restrictive Rule 16.[3]

The Government has now withdrawn and retrenched behind a foggy barrier which would force the corporate defendant to prove that the employees whose testimony is sought occupy a "corporate position [that] is such that, in relation to the type of activity complained of, they properly should be viewed as acting for the corporation."[4]

Whatever this burden is which the Government would place on the defendant, it is clearly inconsistent with the intent behind the Revised Rules. The Government fails to recognize the change. The procedural operation of Rule 16 is not obscure; the Court of Appeals stated it succinctly.

> "Revised Rule 16 represents a significant change in emphasis. Under the prior practice nondisclosure was the norm, and the defendant had to bear the burden of justifying discovery. * * *
>
> Under the revised Rule when the defendant properly makes a claim for inspection under 16 (a) (3) or (b), discovery normally will be granted unless special reasons exist justifying the preservation of secrecy."[5]

The Revised Rule simply grants discovery to the defendant, unless the Government can come forward with "special reasons . . . justifying the preservation of

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[3]App. p. 23, n. 19.
[4]Pet. p. 12.
[5]App. p. 21.

secrecy." Rule 16(a) *grants* discovery to a defendant *unless* the Government makes a sufficient showing under Rule 16(e) which *denies* discovery. The Government confuses the issues by attempting to run them together and in effect place the negative of the 16(e) burden on the defendant.

As the Court of Appeals stated:

> "In this case the government has not presented any special circumstances justifying the restriction or denial of discovery. Therefore, the issue before us is whether the defendants put forward proper claims for disclosure under 16(a) (3) and (b)."[6]

And the Government has conceded that this is not a case where those extraordinary circumstances exist which would justify Rule 16(e) protective orders.[7]

The Government simply misconstrues the operative effect of the Revised Rules. Rules 16(a) and (b) are positive assertions of discovery rights of defendants. A defendant need only meet the threshold requirements of those rules in order to be entitled to discovery. However, even where a defendant is entitled to discovery under Rule 16(a) or (b), discovery may be limited or denied under Rule 16(e).

The scheme is clearly stated by the Advisory Committee.

> "The rule has been revised to expand the scope of pretrial discovery. At the same time provisions are made to guard against possible abuses.

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[6]App. pp. 21-22.
[7]Pet. pp. 10-11.

"Subdivision (a).—The court is authorized to order the attorney for the government to permit the defendant to inspect and copy or photograph three different types of material:

* * *

"(3) ~~Re~~levant recorded testimony of a defendant before a grand jury. The policy which favors pretrial disclosure to a defendant of his statements to government agents also supports, pretrial disclosure of his testimony before a grand jury. Courts, however, have tended to require a showing of special circumstances before ordering such disclosure. See, e.g., United States v. Johnson, 214 F.Supp. 300 (D.Md. 1963). Disclosure is required only where the statement has been recorded and hence can be transcribed."[8]

It is significant that the Committee noted the prior requirement of showing special circumstances. The only requirements under 16(a)(3) now are that the testimony be relevant and recorded.

Following the positive statement of the defendant's rights to discovery is an entirely separate section which operates on all previous sections to limit discovery where an appropriate showing is made.

"Subdivision (e).—This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account

[8]Notes of Advisory Committee on Rules, 18 U.S.C.A. Rule 16, at 18, 19 (1969).

> by the court will be the safety of witnesses and others, a particular danger or [sic] prejury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals."[9]

There is no question in this case that the testimony sought is relevant and recorded. The only question is: "What is a corporation?" The Court of Appeals, not wishing to get embroiled in a question of "theological subtlety",[10] recognized that a corporation can act only through its human agents and held that the availability of Rule 16(a)(3) may not be based on corporate titles.[11]

We respectfully submit, that given a showing that the testimony is relevant to the defense, arbitrary classifications may not be the guide to discovery. The proper guide for discovery under Rule 16(a)(3) is that announced by the Court of Appeals.

> "[T]he defendant corporations may discover the testimony of all present and former officers and employees concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to their employment."[12]

2. Rule 16(b) provides for a broad range of discovery. This was the intention of the Advisory Committee and that they were fully cognizant of the breadth of discovery allowed is expressed in their comments.

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[9] *Id.* at 19-20.
[10] App. p. 23.
[11] App. p. 27.
[12] App. p. 28.

"Subdivision (b).—This subdivision authorizes the court to order the attorney for the government to permit the defendant to inspect the [sic] copy or photograph all other books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government. Because of the necessarily broad and general terms in which the items to be discovered are described, several limitations are imposed:

"(1) While specific designation is not required of the defendant, the burden is placed on him to make a showing of materiality to the preparation of his defense and that his request is reasonable. * * *

"(2) Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. [Citations omitted.]

"(3) Except as provided for reports of examinations and tests in subdivision (a) (2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by 18 U.S.C. § 3500."[13]

The drafters imposed several limitations on what they recognized to be a broad grant of discovery. The defendant must prove that the item sought is material to his defense and that his request is reasonable. Next they specifically exempted numerous items as outside

[13]Notes of Advisory Committee on Rules, 18 U.S.C.A. Rule 16, at 19 (1969).

the scope of discovery. And this makes the failure by the Government to include the exemptions in their presentation of the Rule significant. The exemptions are important in that no exemption is provided for Grand Jury transcripts, although they are specifically mentioned in subsection (a)(3). It is not as though the Committee overlooked Grand Jury transcripts in drafting subsection (b). The logical construction is that used by the Court of Appeals. Transcripts other than testimony of the defendant which is discoverable under 16(a)(3) are documents within the possession of the Government and as such are discoverable under 16 (b).[14]

The Government ignores the overriding function of 16(e) which is available to limit discovery in a proper case, apparently because the exceptional circumstances requisite for 16(e) simply do not exist here. The Government refuses to recognize that Rule 16 has not merely been reworded but reworked; they refuse to recognize the change.

## Conclusion.

The Government never addresses itself to the real issue which ties the various sections of Rule 16 together. The courts and commentators have long championed the need for expanded discovery in the criminal setting. The Judicial Conference, through the Advisory Committee, Congress, and this Court, has promulgated rules designed to satisfy that need—the need for information in the possession of the Government, for adequate preparation of a defense to a criminal charge.

[14]App. p. 33, n. 37.

The Rules recognize the need and grant the criminal defendant the right to specialized discovery; however, the right is limited to safeguard the overriding interests of the Government upon a proper showing.

The Court of Appeals has placed a logical and fair construction on the Rules. Once a defendant has satisfied the threshold requisites for discovery, discovery will be granted unless the Government comes forward with sufficient reason to limit discovery. Here, the Government has made no effort to satisfy that burden; the decision of the Court of Appeals is correct.

The Petition for Certiorari should be denied.

Respectfully submitted.

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## APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 24101

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UNITED STATES OF AMERICA, PETITIONER

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

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No. 24120

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GIFFORD-HILL-AMERICAN, INC., PETITIONER

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

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No. 24121

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UNITED CONCRETE PIPE CORPORATION
and LLOYD R. EARL, PETITIONERS

*versus*

HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, RESPONDENT

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*Petitions for Writs of Mandamus to the United States District Court for the Northern District of Texas*

(June 2, 1969)

Before GODBOLD and SIMPSON, Circuit Judges, and McRAE, District Judge.

GODBOLD, Circuit Judge: These three petitions for writs of mandamus raise important questions concerning the construction of the discovery provisions of the recently revised Federal Rules of Criminal Procedure, Fed. R. Crim. P. 16.[1] The cases were assigned for oral

[1]The revised Rule 16 and the Advisory Committee's Notes appear at 39 FRD 163, 173-78 and at 18 U.S.C.A. Rule 16 (Supp. 1969). Parts of the Rule pertinent to this case are as follows:

> (a) *Defendant's Statement; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph . . . (3) recorded testimony of the defendant before a grand jury.
>
> (b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government; upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does

(This footnote is continued on the next page)

argument and supplemental briefing in an earlier opinion of this court. *United States* v. *Honorable Sarah T. Hughes,* 388 F.2d 236 (5th Cir. 1968).

All three cases arise out of a pending Sherman Act prosecution[2] in the Northern District of Texas. An indictment was returned January 20, 1966, charging United Concrete Pipe Corporation, Gifford-Hill-American, Inc., and Lloyd R. Earl, formerly Chairman of the Board of United, with conspiracy to fix prices, to submit rigged non-competitive bids and to divide the Texas market for concrete pressure pipe. The defendants in that criminal prosecution are the petitioners in Nos. 24120 and 24121. The United States is the petitioner in No. 24101.

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not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.

(e) *Protective Orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera.* If the court enters an order granting relief following a showing *in camera,* the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

[2]15 U.S.C.A. § 1 (1963).

On July 21, 1966, and subsequently,[3] the defendants filed pre-trial motions for discovery under Rule 16.[4] Under Rule 16 (a) (3), which allows a defendant to discover his recorded testimony before a grand jury, they moved for the production of the testimony of all present and former officers and employees of the corporate defendants before the Dallas, Texas grand jury which returned the indictment and a Los Angeles grand jury which previously had investigated a similar alleged conspiracy involving some of the defendants in the Texas prosecution. The defendants also moved under 16 (b), which allows a defendant discovery upon a showing of materiality to the preparation of the defense and of reasonableness, for the production of all documents material to the preparation of the defense, including transcripts of the Dallas and Los Angeles grand juries.

In an order reported at 41 F.R.D. 538,[5] the motions were granted in part and denied in part. Under 16 (a) (3) District Judge Hughes allowed the corporate defendants to discover the testimony of officers and former officers before both grand juries.[6] Under 16 (b) she allowed the defendants to discover documents submit-

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[3]The effective date of the amendment of Rule 16 was July 1, 1966.

[4]The defendants' motions are set out in detail in sections 3 and 4 of this opinion, *infra*.

[5]This order subsequently was amended in minor respects in an unreported order.

[6]The order was in terms of "officers" but one of the individuals named was an ex-officer of one of the corporate defendants.

ted by all witnesses to the Dallas grand jury and by two key witnesses to the Los Angeles grand jury. Both the prosecution and the defendants filed the instant petitions attacking the court's rulings.

Following our initial opinion in this case, and pursuant to a suggestion therein, the defendants filed supplemental motions in the district court seeking discovery of the testimony of officers and employees on the basis of Fed. R. Crim. P. 6 (e).[7] The district court, on a finding of particularized need, granted the same discovery under Rule 6 (3) which it previously had granted under its 16 (a) (3) order, plus the testimony of two named employees of United.[8] The court refused to grant dicovery of the testimony of several additional employees on the ground that no particularized need exsisted.

Although the government insists that the district court's original order is erroneous insofar as it rests on Rule 16 (a) (3), it does not attack the second order issued under Rule 6 (e). Since the second order grants the same relief as the first (plus the testimony of two additional witnesses), the government's mandamus petition, No. 24101, is effectually mooted. However, since the testimony of defendants' employees granted under the Rule 6 (e) order is that of less than all their employees, and since they claim to be entitled to the testi-

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[7]Also the motions reasserted 16(b) as a basis for discovery.

[8]The second order also removed a restriction in the first order which had prohibited the defendants from exchanging discovered information.

mony of all employees as a matter of right under Rule 16 (a) (3) and 16 (b), their petitions remain viable.[9]

The issues that now remain for decision are:

(I) Is mandamus an appropriate remedy in this case?

(II) Under Rule 16 (a) (3), are the corporate defendants entitled to discovery of the testimony given before the Los Angeles and Dallas grand juries by their present and former officers and employees?

(III) Did the court properly refuse the defendants' motions under Rule 16 (b) for the production of all documents in the government's possession material to the preparation of the defense and for the disclosure of the grand jury transcripts?

1. Propriety of mandamus

All parties join in urging that mandamus is an appropriate remedy. But if we lack judicial power parties may not confer it upon us by concurring in a request for action. Therefore, we undertake an independent evaluation of the propriety of mandamus in this case.

The jurisdictional predicate of the All Writs Act, 28 U.S.C.A. § 1651, traditionally has been that a writ "issue in aid of an exercise of the Court of Appeals' appellate jurisdiction." *Will* v. *United States*, 389 U.S. 90, 95 n.4, 19 L.Ed. 2d 305, 310 n.4 (1967).[10] The

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[9]The government does not contest the 16(b) order. However, it does oppose the defendants' claim that they are entitled to broader discovery under 16(b) than was granted.

[10]Several recent cases point toward an expansion of the scope of mandamus in the exercise of the "supervisory control

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Court in *Will* illustrated differing views of this requirement's application to interlocutory orders in criminal cases with the following citation: "Compare *In re United States,* 348 F.2d 624 (C.A 1st Cir. 1965) with *United States* v. *Bondy,* 171 F.2d 642 (C.A. 2d Cir. 1948)." Id. In *Bondy* the government sought mandamus to determine the propriety of a pre-trial order granting discovery to the defendants. The Second Circuit pointed out that because the government may not appeal in a criminal case, the order could not otherwise be reviewed by the court of appeals. It concluded that mandamus was not appropriate since "we have neither actual nor potential jurisdiction to review the order." 171 F.2d at 664. The First Circuit took a broader view of "potential jurisdiction" in *In re United States, supra.* Because an order allowing a criminal defendant to take depositions of government witnesses could be tested prior to trial by a contempt proceeding or by dismissal of the indictment, Judge Aldrich stated, "we see no reason why the government should not be able to do directly what it could effectuate indirectly." 348 F.2d at 625.

The present case fits within the views of both the First and Second Circuits of "potential jurisdiction." Because of the present posture of the case the relief which we could grant on mandamus would operate in favor of

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of the District Courts by the Courts of Appeal." See LaBuy v. Howes Leather Co., 352 U.S. 249, 259-60, 1 L.Ed. 2d 290, 299 (1957); Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968); *In re* Watkins, 271 F.2d 771 (5th Cir. 1959). Since we conclude that the issuance of the writ is in aid of our appellate jurisdiction in the more traditional sense, we do not rely upon a rationale of an independent supervisory power as a basis for jurisdiction.

the defendants. The defendants, the only parties claiming to be prejudiced by the 16 (a) (3) and 16 (b) orders, could, if convicted, challenge those orders on appeal. By passing on the court's orders at this juncture we would, in Judge Aldrich's terms, be doing directly what we could do indirectly. Moreover, unlike *Bondy*, we would not be reviewing an interlocutory order which could not be otherwise reviewed in the court of appeals. Insofar as the jurisdiction prerequisites of 28 U.S.C.A. § 1651 are concerned, we conclude that the mandamus petition is properly before us.

Our finding of jurisdiction is only the beginning of the inquiry. As the Supreme Court emphasized in *Will*, even when mandamus is within a court's jurisdiction it may be employed only in exceptional causes. *See also Ex parte Fahey*, 332 U.S. 258, 260, 91 L. Ed. 2041, 2043 (1947). We recognize, and reiterate, that extraordinary prerogative writs may not be used indiscriminately to review interlocutory orders, *La Buy* v. *Howes Leather Co.*, *supra*, or to thwart the Congressional policy against piecemeal appeals, *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26, 87 L.Ed. 1185 (1943), or to alleviate the hardship resulting from an unnecessary trial in a particular case, *United States* v. *Alkali Export Ass'n*, 325 U.S. 196, 202-03, 89 L.Ed. 1554, 1560 (1945). Our reluctance to interfere with the progress of a trial is especially strong in criminal cases, where the Sixth Amendment guarantee of a speedy trial is present. *See, e.g., Will, supra; Carroll* v. *United States*, 354 U.S. 394, 1 L.Ed. 2d 1442 (1957); *Cobbledick* v. *United States*, 309 U.S. 323, 84 L.Ed. 783 (1940).

Despite our appropriate reluctance to employ the mandamus remedy, we conclude that a cumulation of fac-

tors causes this case to be of the exceptional and extraordinary nature that justifies the use of the writ. *Schlagenhauf* v. *Holder,* 379 U.S. 104, 13 L.Ed. 2d 152 (1964).[11] The issues presented are basic, they concern the extent of a district court's power under a newly adopted rule of procedure, and they have not been passed on by this court. *See Securities and Exchange Commission* v. *Krentzman,* 397 F.2d 55 (5th Cir. 1968). District courts within the circuit are in conflict over the questions raised in this case, *see United States* v. *Venn,* 41 F.R.D. 540 (S.D. Fla. 1966); *United States* v. *I. G. Balfour Co.,* Crim. No. 2407 (N.D. Ga. 1967), and the exercise of our "expository and supervisory functions" will limit further disparity. *La Buy* v. *Howes Leather Co., supra; Atlass v. Miner,* 265 F.2d 312, 313 (7th Cir. 1959), *aff'd* 363 U.S. 641, 4 L.Ed. 2d 1462 (1960). The trial of the present case and similar cases would be lengthy and expensive, causing a heavy burden on the litigants and a drain on judicial manpower. Finally, our sensitivity to the Sixth Amendment considerations is assuaged by the fact that, as noted above, the defendants in this case seek relief and are the only parties who could be benefited by review of these orders. *Madison-Lewis, Inc.* v. *MacMahon,* 299 F.2d 256 (2d Cir. 1962); *compare Will, supra; In re United States, supra.*

In holding that mandamus is appropriate, we issue the same caveat as the Supreme Court did in *Schlagenhauf.* The appropriateness of the writ in this particular instance is not to be construed as making mandamus ap-

[11] *See also* Harris v. Nelson, 37 U.S.L. Week 4219 (Sup. Ct. March 24, 1969).

propriate in subsequent cases in which the principles of Rule 16 discovery set forth in this opinion are applied. Part of the extraordinary nature of what is before us is the compelling need to settle a new issue so that it can become only an ordinary issue.

2. Rule 16 Motions—Background

While authority construing the newly revised Rule 16 is as yet meager, two decades of debate over the expansion of criminal discovery provides a guide to its interpretation. The revision was prompted in large measure by "the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice." *Dennis* v. *United States*, 384 U.S. 855, 870-71, 16 L.Ed. 2d 973, 984 (1966). In light of the movement toward liberal criminal discovery as advocated by the commentators[12] and successfully

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[12]Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 Wash. U.L.Q. 279; Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 Duke L.J. 477; Garber, *The Growth of Criminal Discovery*, 1 Crim. L.Q. 3 (1962); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960); Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 Neb. L. Rev. 127 (1962); Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 Calif. L. Rev. 56 (1961); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. Va. L. Rev. 221 (1957); Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276 (1966); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668 (1962); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964); Symposium, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47 (1963); Note, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940 (1961); Comment, *Discovery By a Criminal Defendant of His Own Grand-Jury Testimony*, 68 Colum. L. Rev. 310 (1968). Authorities are collected in Advisory Committee's Note, 18 U.S.C.A. Rule 16 (Supp. 1969).

implemented in state courts,[13] we approach problems of construing the Rule with the "realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis* v. *United States, supra.*

Revised Rule 16 represents a significant change in emphasis. Under the prior practice non-disclosure was the norm, and the defendant had to bear the burden of justifying discovery. *Cf. Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400, 3 L.Ed. 2d 1323, 1327 (1959). The revised Rule operates on the premise that "abuses [of discovery] are a matter of legitimate concern—they argue however not for wholesale prohibition of criminal discovery but for circumspection and for appropriate sanctions tailored to dealing with apprehended abuses in the particular case." Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 Wash. U.L.Q. 279, 292. Under the revised Rule when the defendant properly makes a claim for inspection under 16 (a) (3) or (b), discovery normally will be granted unless special reasons exist justifying the preservation of secrecy. *See United States* v. *Leighton,* 265 F. Supp. 27, 39 (S.D. N.Y. 1967). *United States* v. *Federaman,* 41 F.R.D. 339 (S.D. N.Y. 1967); W. Barron & A. Holtzoff, Federal Practice & Procedure, Rules Ed. § 2033, at 61 (Wright, ed.) (Supp. 1967); Rezneck, *The New Federal Rules of Criminal Precedure,* 54 Geo. L.J. 1276, 1277 (1966).

In this case the government has not presented any special circumstances justifying the restriction or denial

[13] *See, e.g.* People v. Chapman, 52 Cal. 2d 95, 338 P.2d 428; State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); *see generally* Fletcher, *Pretrial Discovery in State Criminal Cases,* 12

of discovery. Therefore, the issue before us is whether the defendants put forward proper claims for disclosure under 16 (a) (3) and (b).

3. The 16 (a) (3) Motions

Under 16 (a) (3) each defendant sought the recorded testimony given before the Los Angeles and Dallas grand juries[14] by named persons said to be employees and former employees of the corporate defendants at the time of giving such testimony.[15]

The court granted the motions of the corporate defendants insofar as they applied to present and former officers,[16] holding that the Rule's provision allowing discovery of "recorded testimony of the defendant before a grand jury" entitled the corporations as a matter of right to discover their officers' testimony.[17] Both the defendants and the government object to the court's ruling, the government claiming that it is too broad, the defendants that it is too narrow.[18]

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[14]The indictment returned by the Dallas grand jury related only to the Texas market. The investigation of the Los Angeles grand jury extended to areas other than Texas and Texas as well. The Los Angeles indictments named as defendants United and Earl but not Gifford-Hill-American. United, Earl, and other defendants pleaded *nolo contendere* and the court imposed fines.

[15]Some of those whose testimony was sought were alleged by the government to be co-conspirators.

[16]*See* note 6, *supra*.

[17]Rule 16(a)(3) allows the defendant to discover his recorded testimony "before *a* grand jury." We conclude that under the circumstances of this case the trial court correctly held that the corporate defendants' discovery rights under 16(a)(3) extended to testimony before both the Los Angeles and Dallas grand juries.

[18]Each defendant also moved under Rule 16(a)(1) for any relevant written or recorded statements made by it (or him) within the possession, custody, or control of the government. None of the parties attack the court's rulings on these motions in the present case, consequently they are not before us.

The government's construction of Rule 16 (a) (3) may be simply stated: the Rule applies only to natural persons, not to corporations—only the testimony of "the defendant" may be discovered, and officers and employees are not defendants but agents of the defendant. The distinction is emphasized by reference to 15 U.S.C.A. §§ 32 and 33 which provide that persons who testify before the grand jury are granted immunity from antitrust prosecution. This, the government points out, the officers and employees who testify not only are not defendants but cannot become defendants.

While the government's argument has the virtue of simplicity, it is misdirected. The revision of Rule 16 was designed to liberalize the prior discovery practice, not restrict it.[19] Moreover categorization is not as simple as the government would have it. The corporation traditionally has occupied an anomalous place in criminal law.[20] Corporations can act only through human agents, and whether in a particular instance the corporation or the agent is acting is a question that may attain almost theological sublety.[21]

To bolster its restricted interpretation the government argues that because of the threat of economic reprisal after disclosure of their testimony officers and employees may be deterred from furnishing information to the government and from testifying truthfully if they

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[19]The government's construction would foreclose the corporation from all discovery under the revised Rule 16(a)(3). Under the prior rule discovery was freely granted to corporate defendants. *See, e.g.*, Bowman Dairy Co. v. United States, 341 U.S. 214, 95 L.Ed. 879 (1951).

[20]*See, e.g.*, Fletcher, Corporations ch. 55 (rev. ed. 1961).

[21]*See* Comment, *Discovery by a Criminal Defendant of His Own Grand-Jury Testimony*, *supra* note 12, at 325 (1968).

appear as grand jury witnesses. But as Professor Calkins points out,

> A witness is not a confidential informant; he must consider his testimony subject to all the obligations of oath required in any judicial proceeding. In revealing damaging evidence before the grand jury, the witness must expect that such evidence will be disclosed at trial. Therefore, any hesitancy that a witness might have in divulging harmful evidence before the grand jury ordinarily would be based upon a fear of the eventual necessity of giving that same evidence in open court rather than the fear that, having once given such harmful evidence, his grand jury testimony might be divulged. Disclosure of the prior testimony will not unduly discourage free statements by witnesses before the grand jury.

Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 461 (1965).[22] To the extent that the danger does exist, it can be met by appripriate restrictions in the particular case rather than a denial of discovery in all cases. Indeed, Rule 16 (e) was designed to deal with the very evils the government advances. The Advisory Committee's Note states:

> *Subdivision (e).* This subdivision gives the court authority to deny, restrict or defer discovery

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[22]Existing laws against intimidating witnesses tend to limit dangers of economic reprisal. Also the presumption that the corporation will retaliate assumes that the corporation will desire its personnel not testify when in fact the corporation, presumed to be innocent of criminal conduct, may have no objection, or may even desire, that its personnel testify. *Cf.* Goldstein, *supra* note 12, at 1192-94. The supposition that the witness will not come forward or testify truthfully disregards the carrot of immunity offered by 15 U.S.C.A. §§ 32-33 and the stick of perjury prosecution if he does not reveal the truth.

> upon a sufficient showing. Control of the abuses of discovery is necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, . . . and the protection of business enterprises from economic reprisals . . . .

18 U.S.C.A. Rule 16 (Supp. 1969).

Balanced against the possibility of employee coercion are weighty considerations favoring corporate discovery.[23] Restricting discovery is contrary to the supposition that disclosure rather than suppression is preferred. *See Dennis* v. *United States, supra.* The corporate defendant does not enjoy the privilege against self-incrimination,[24] which has been described as the *quid pro quo* of limited discovery.[25] In preparing the government's case the prosecutor is able to use the grand jury as his own

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[23]Mr. Justice Brennan points out that liberalized discovery can benefit the prosecution as well as the defense:

> "And might not expanded discovery benefit the prosecution as well as the accused? If sharpening of the issues, exposure of untenable arguments and more efficient marshalling of the evidence result from discovery, doesn't the prosecution profit? For if voluntary disclosure to defense counsel often results in guilty pleas because defense counsel becomes convinced of the hopelessness of the client's cause, should not a rule authorizing criminal discovery in every case result in even more dispositions without trial? . . . .What justifies our being so sure then that according criminal discovery to the accused will benefit only the accused at the expense of the state?"

Brennan, *supra* note 12, at 287-88.

[24]Essgee Co. v. United States, 262 U.S. 151, 67 L.Ed. 917 (1923); Wilson v. United States, 21 U.S. 361, 55 L.Ed. 771 (1911); Hall v. Henkel, 201 U.S. 43, 50 L.Ed. 652 (1906).

[25]United States v. Garson, 291 F. 646, 649 (S.D. N.Y. 1923) (L. Hand, J.); *but see* Goldstein, *supra* note 12.

discovery device, with the subpoenaing of defense witnesses achieving much of the effect of a full-fledged deposition procedure. *See* Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 231 (1964). Finally, the criminal prosecution of corporations, which frequently involves alleged violations of such statues as the securities and antitrust acts, often resembles the most complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth.

Four district courts which have ruled on the question have agreed with the conclusion that corporate defendants are entitled to discovery under 16 (a) (3). But they have differed over the question of whose testimony the corporation may discover. In the present case the testimony of officers and former officers was held discoverable.[26] In *United States* v. *Aeroquip Corp.*, 41 F.R.D. 441 (E.D. Mich. 1966), discovery of the testimony of officers and of corporate representatives who testified in response to subpoenas addressed to the corporation was granted. The court in *United States* v. *I. G. Balfour Co.*, Crim. No. 2407 (N.D. Ga. 1967) allowed the corporation to reach the testimony of all officers, directors and managing agents. In *United States* v. *Venn*, 41 F.R.D. 540 (S.D. Fla. 1966), the testimony of all officers, directors, agents, and employees, but not former employees, was held discoverable.[27]

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[26] *See* note 6, *supra*.

[27] As we pointed out in our prior opinion in this case, the decision in *Venn* was based on discretionary factors as well as the trial court's construction of Rule 16(a)(3). 388 F.2d at 238-39.

In United States v. Socony Mobil Oil Co., Crim. No. 837 (D. Kan. 1966) the court granted the corporate defendant discovery of the testimony of a corporate employee alternatively under 16(a)(3) and 16(b).

In our view these decisions focus too sharply on categorizations of corporate spokesmen that are not necessarily related to considerations underlying a meaningful right of discovery. The significance of a witness' testimony to the inquiry into potential corporate criminal liability, and to the defense in preparing its case, does not depend upon organizational charts. What all the participants—parties, counsel, grand jury, and trial jury if there be one—want to ascertain is what the witness knows, whether it is competent, and what probative value it has on the issues. The non-officer may play a more significant role in the corporation's actions under inquiry than an officer.[28] If the door to Rule 16 (a) (3) is to be open to corporations at all—and we are of the opinion that it must—its availability should not be based upon corporate titles. Similarly, the fact that a witness has terminated his connection with the corporation after the relevant events have occurred does not bear on the significance of his testimony.

In articulating limits for corporate discovery under Rule 16 (a) (3) we bear in mind both theoretical considerations and practical limitations. The discovery rights of the corporation must be reasonably related to corporate activity. Thus, the testimony of an employee that he saw a transaction on a public street on his day

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[28]The grand jury indictment in this case charged conspiracy to restrain trade in the Texas market. The non-officer employees to whose testimony access has been denied under the 16(a)(3) order include the general manager of Texas operations for United during the period covered by the indictment, a Texas salesman, superintendent, and office manager of United, United's chief estimator, and several of Gifford-Hill-American's salesmen, managers, and estimators.

off should not be automatically discoverable by the corporate defendant. Similarly, a witness who had no connection with the corporation at the time the relevant events occurred should not be brought within the purview of 16 (a) (3) by being put on the corporate payroll on the day that he testifies. On the other hand, limitations on the corporation's discovery rights must be practicably commensurate with the efficient utilization of the energies of counsel and the court. A test that necessitated a detailed inquiry by the trial judge into a voluminous record would not be satisfactory.[29]

We hold that under Rule 16 (a) (3) the defendant corporations may discover the testimony of all present and former officers and employees concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to their employment.[30] In so holding, we reiterate that if circumstances exist justifying the denial, restriction, or deferral of discovery in the particular case, the government may seek appropriate orders under Rule 16 (e). We also acknowledge that in those unusual cases where special circumstances pointing toward the denial or restriction of discovery exist, the determination of whether the interests of justice favor disclosure may necessitate a delicate balancing of

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[29]For this reason we reject the test proposed in Comment, *Discovery by a Criminal Defendant of His Own Grand Jury Testimony*, *supra* note 12, at 329-33, that a corporate defendant be permitted to discovery "testimony given by any member or former member of the corporate organization, where the testimony concerns alleged conduct of that member for which the prosecution seeks to hold the defendant criminally responsible."

[30]It is our view that the responsibility should be on the government to show that all or part of testimony sought falls outside these limits.

opposing considerations, and appropriate deference will be accorded by this court to the trial judge's determinations. *See* Symposium, *Discovery in Federal Criminal Cases,* 33 F.R.D. 47, 65 (remarks of Mr. Justice Brennan). Finally, we recognize that under the revised Rule the trial judge retains discretion in regulating such incidents of discovery as the time, place, and manner of disclosure so as to assure the orderly progress of litigation.

4. The 16 (b) motions

Rule 16 (b) discovery motions were filed by United and Earl and by Gifford-Hill-American seeking an order directing the government to permit them to inspect and copy or photograph all books, papers and documents in the possession, custody or control of the government relating to the subject matter of the indictment, including but not limited to documents submitted to the Los Angeles and Dallas grand juries by Weyerman and Greenway (former executives of United) and the transcripts of all testimony given before the Los Angeles and Dallas grand juries.

In support of their motions the defendants filed affidavits and lengthy memoranda detailing the bases of their requests. United and Earl stated that some of the documents submitted to the grand juries contained details of the various purported illegal agreements, and that, while they had duplicates of some of the documents, inspection of the originals was required to determine their authenticity. They stated that since Weyerman and Greenway had been named as co-conspirators under the Dallas indictment, their acts and declarations would be admissible against the defendants. Finally,

they claimed a need for the Los Angeles grand jury transcript in order to prepare a possible defense of double jeopardy.[31]

Gifford-Hill-American's memorandum and supporting affidavit specified a need for the documents submitted by Weyerman and Greenway in order to discover the declarations of these two alleged co-conspirators, and a need for other documents submitted to the Dallas grand jury in order to authenticate documents in Gifford-Hill-American's possession.

The court granted both motions with respect to documents submitted by Weyerman and Greenway to the Los Angeles grand jury[32] and by all witnesses to the Dallas grand jury, "except that this Order does not authorize disclosure of such documents which are not material to proof of the conspiracy alleged in the indictment or which deal with collateral matters which may possibly arise at trial."[33] In other respects the motions were denied.

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[31]United and Earl contended that many of the witnesses who had testified before the Los Angeles grand jury subsequently testified before the Dallas grand jury, and that they needed the Los Angeles grand jury transcript to ascertain if the alleged Texas conspiracy was merely an extension of the conspiracy for which they already had been convicted.

[32]By the court's order under Rule 6(e) the defendants have been granted access to the Los Angeles grand jury testimony of Weyerman and Greenway, as well as all officers of United and Gifford-Hill-American.

[33]The order also exempted from disclosure internal government documents made by government agents in connection with the investigation or prosecution of the case and statements of government witnesses or prospective witnesses covered by the Jencks Act, 18 U.S.C.A. § 3500 (Supp. 1969).

The government does not challenge the order insofar as it directs the production of documents submitted to the grand juries. But the defendants maintain that the trial judge erred in failing to make available all material documents in the government's possession and in restricting discovery, where granted, to items relevant to the proof of the conspiracy.

First we consider documents other than grand jury transcripts. Unlike Rule 16 (a), Rule 16 (b) imposes as a prerequisite to discovery the requirement that there be a showing of materiality to the preparation of the defense and of reasonableness. Because the defendant cannot be expected to know the exact nature of what he has not yet seen, specific designation is not required. *See* Advisory Committee's Note, 18 U.S.C.A. Rule 16 (Supp. 1969). If the documents in the possession of the government are voluminous the defendant need not lay a detailed foundation of materiality for each item. *United States* v. *Fancher*, 195 F.Supp. 449, 450 (D. Conn. 1961); *United States* v. *Greater Blouse, Skirt & Neckware Contractors Ass'n*, 177 F.Supp. 213 (S.D. N.Y. 1959); *cf. Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 95 L.Ed. 879 (1951). However, there must be a definite delineation of the subject matter sought. A blanket demand for "all material information in the possession of the government" does not suffice to establish materiality. *See* Barron & Holtzoff, *supra* at 2033 (Supp. 1967); Rezneck, *supra* at 1280; *cf. People* v. *Cooper*, 53 Cal. 2d 775, 770, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 Calif. L. Rev. 56, 83-84 (1961).

The shotgun motions of the defendants did not comply with these requirements, and the trial judge did not err in refusing the defendants' requests for "all material documents."[34] However, the materiality that must be shown is materiality to the preparation of the defense, not materiality to proof of the conspiracy.[35] The court's order should be modified to apply the correct materiality standard.

We turn now to grand jury transcripts. The government's opposition to the defendants' discovery of grand jury transcripts rests primarily on the contention that Rule 16(b) does not apply to grand jury transcripts. The government says that revised Rule 16 (b) is a restatement of former Rule 16,[36] under

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[34]The defendants did attempt to delineate a need for the production of documents submitted to the Los Angeles grand jury by Wilson, a former United employee. However, the defendants have not contended that Wilson is an alleged co-conspirator and do not otherwise show sufficiently how his testimony would be material to the preparation of the defense. From the record before us we cannot conclude that the trial court erred in denying discovery of documents submitted by Wilson.

[35]As Rezneck points out, the revised Rule "does not limit the defendant to discovering the case against him. It evidently contemplates that his discovery may encompass a search for evidence which he may use to support his own case or to impeach the government's." Rezneck, *supra* note 12, at 1279. *See also* United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 177 F. Supp. 213 (S.D. N.Y. 1959).

[36]The former version of Rule 16 provided:

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

which grand jury transcripts were not discoverable. This disregards the fact that the old version of Rule 16, unlike the revised Rule, restricted discovery to items "obtained from or belonging to the defendant or obtained from others by seizure or process." The government also argues that reading the discovery provisions of Rule 16 in conjunction with the provisions of Rule 6 relating to grand jury proceedings precludes grand jury transcripts from discovery under 16 (b). We find nothing on the face of either rule that commands this result.[37] Rule 16 (b) permits the court to allow the defendant to inspect and copy "books, papers, documents, tangible objects, buildings or places. . . ." Grand Jury transcripts are "documents." *Cf. Fryer* v. *United States,* 207 F.2d 134, 136-37 (D.C. Cir. 1953). Rule 6 (e) prohibits the disclosure of grand jury transcripts except by order of the court, but its provisions do not delimit when such orders should or should not be made in discovery proceedings.[38]

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[37]The government maintains that the caption of Rule 16(b), which indicates that the subdivision applies to "*other* Books, Papers, Documents, Tangible Objects or Places," suggests that 16(b) applies to documents other than grand jury transcripts, which are dealt with in 16(a)(3). However it is more in keeping with the language of 16(a)(3) to read the caption of 16(b) as meaning "other than the grand jury testimony *of the defendant.*"

[38]*Rule 6. The Grand Jury.*

* * * *

"(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who

(This footnote is continued on the next page)

Finally, the government urges that the requirement of "particularized need" as enunciated in cases construing Rule 6 (e) prior to the amendment of Rule 16[39] is an implied limitation on a defendant's discovery rights under Rule 16. However, the draftsmen of the revised Rule were careful to make exceptions to its otherwise all-inclusive provisions for items subject to discovery under the Jencks Act and for internal government reports and memoranda. It is improbable that an exception to Rule 16 (b) for the statutory discovery provisions of the Jencks Act would be specifically mentioned while an exception for the judicially developed doctrine under Rule 6 (e) of discovery based on particularized need would be included only by implication. The government emphasizes strongly the "long established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677,

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transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

[39] *See* Dennis v. United States, 384 U.S. 855, 16 L.Ed. 2d 973 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 3 L.Ed. 2d 1323 (1959); United States v. Procter & Gamble Co., 356 U.S. 677, 2 L.Ed. 2d 1077 (1958).

681, 2 L.Ed. 2d 1077, 1081 (1958).[40] Access to grand jury transcripts, like all discovery in criminal cases, traditionally has been restricted,[41] but there has been a growing tendency to limit secrecy after the grand jury has completed its work to those cases where secrecy serves legitimate policy considerations. See *Dennis* v. *United States, supra; United States* v. *Youngblood, supra; Calkins, supra, Sherry, Grand Jury Minutes; The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668 (1962).[42]

Factors arguing for secrecy[43] do not necessitate the restrictive construction of Rule 16 (b) urged by the

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[40]On discovery of grand jury documents in civil antitrust cases, *see* State of Illinois v. Harper & Row, Publishers, Inc., Civil No. 67C1899 (N.D. Ill., 1968), *petition for writ of mandamus refused sub nom.* Harper & Row Publishers, Inc. v. Decker, 7th Cir., 1969, ....F.2d.... [No. 17320, January 9, 1969], *cert. denied* 37 U.S.L. Week 3369 (April 1, 1969), holding that plaintiffs in a treble damage suit may discover grand jury documents under Fed. R. Civ. P. 34 upon alleging relevance and materiality, rather than particularized need.

[41]Between the adoption of Fed. R. Crim. P. 6(e) in 1946 and the July 1, 1966 amendment of Rule 16, discovery of grand jury transcripts was more readily available than discovery of most other items. Under 6(e), discovery of grand jury transcripts was granted whenever "particularized need" was shown. *See* Dennis v. United States, 384 U.S. 855, 16 L.Ed. 2d 973 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 3 L.Ed. 2d 1323 (1959). The only other provisions allowing discovery applied in the narrow circumstances specified in the Jencks Act, 18 U.S.C.A. § 3500 (Supp. 1969) and in former Rule 16. *See* note 36, *supra*.

[42]Some states have gone so far as to eliminate post-indictment grant jury secrecy altogether. *See* Cal. Pen. Code § 938.1 (West Supp. 1967); Iowa Code Ann. § 772.4 (1950); Ky. R. Crim. P. 5.16 (1964); Minn. Stat. Ann. §628.04 (1947); ch. 196, § 95-1406(e), [1967] Mont. Laws 395; Okla. Stat. Ann. tit. 22, § 340 (Supp. 1967).

[43]*See, e.g.*, Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405, 3 L.Ed. 2d 1323, 1330 (1959) (Brennan, J.) (dissenting opinion); United States v. Youngblood, 379 F.2d 363, 370 n.3 (2d Cir. 1967).

government. The prevention of accused's arrest is not a consideration at the pre-trial discovery stage. Protection of individuals not indicted is a limited problem at pre-trial—if no indictment is returned there is no disclosure, and if some persons are indicted and some are not testimony concerning persons not indicted can be deleted if not material to preparation of the defense. The dangers arising from possible intimidation of witnesses have been discussed in an earlier section of this opinion. *See* text at note 22, *supra*. Discovery need not compromise the grand jury's deliberative process, since the deliberations and notes of the grand jury, as opposed to testimony, may not be material and if material may be the subject of protective orders where appropriate.[44]

In circumstances where nondisclosure serves legitimate ends, the judge is allowed under 16 (e) to deny, restrict, or defer discovery and the government is permitted to seek appropriate restrictive orders. Only where secrecy does not serve legitimate, overriding purposes is discovery of grand jury transcripts mandated by the Rule. Moreover, in cases where disclosure of grand jury transcripts to the defendant is appropriate, discovery need not be a one-way street, for Rule 16 (c) authorizes the court to condition its discovery order in favor of the defendant on the defend-

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[44]Moreover Rule 6(e) suggests that the grand jury's deliberations and the vote of any juror are not subject to discovery. *See* note 38, *supra*.

ant's allowing the government access to items material to the preparation of the government's case.[45]

Turning to the present case, discovery to ascertain the existence of double jeopardy fits well within the Rule 16 (b) requirement of materiality to the preparation of the defense. According to the defendants' allegations, the Los Angeles grand jury has completed its work, therefore production of its transcript in the Texas District Court would not appear unreasonable.[46] Unless the government shows that the information regarding possible double jeopardy can be obtained from other sources,[47] or that portions of the grand

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[45]"*Rule 16. Discovery and Inspection.*

"(c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

[46]The prior discovery orders by Judge Hughes relating to the Los Angeles grand jury transcript have been conditioned upon the approval of the United States District Court for the Southern District of California. Similar conditions in future discovery orders are, of course, appropriate.

[47]*See* Rezneck, *supra* note 12, at 1220: "A request for items material to the preparation of the defense would ordinarily be reasonable unless, for example, the defendant already had some access to the matters sought."

jury transcripts do not bear on the double jeopardy issue, or that a denial, restriction, or deferral of discovery of all or part of the transcripts is otherwise appropriate, United and Earl's motion for the production of grand jury transcripts should be granted.[48]

The defendants' petitions for writs of mandamus are GRANTED. The defendants are entitled to be allowed the discovery sought by them to the extent provided by this opinion.[49] However, the government may, if it desires, present to the district judge appropriate motions under Rule 16 (c) and 16 (e).

WRIT GRANTED.

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[48]Gifford-Hill-American does not contend that it faces double jeopardy, and it has not otherwise shown a need for the production of the transcript.

[49]The defendants' complaint that the trial court's discovery orders are unclear in several respects. We do not deal with these contentions in this mandamus proceeding. If the orders are unclear, the defendants can seek clarification from the district court.

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No. 515

# In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA AND HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, PETITIONERS

*v.*

GIFFORD-HILL-AMERICAN, INC., UNITED CONCRETE PIPE CORPORATION AND LLOYD R. EARL

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM SUGGESTING MOOTNESS

ERWIN N. GRISWOLD,
*Solicitor General.*

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 515

UNITED STATES OF AMERICA AND HONORABLE SARAH T. HUGHES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, PETITIONERS

*v.*

GIFFORD-HILL-AMERICAN, INC., UNITED CONCRETE PIPE CORPORATION AND LLOYD R. EARL

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM SUGGESTING MOOTNESS

We file this memorandum to advise the Court of facts, occurring since the grant of our petition for a writ of certiorari, which we believe render the cause moot.

The judgment of the Court of Appeals for the Fifth Circuit, entered June 2, 1969, granted mandamus petitions by corporate defendants in the underlying criminal antitrust action (Cr–3–690, N.D. Texas, Dallas Div.), seeking pre-trial inspection of certain grand jury transcripts. The questions presented here

involve the propriety of requiring disclosure of such transcripts under Rules 16(a)(3) and 16(b) of the Federal Rules of Criminal Procedure.

On December 19, 1969, the district court, over objection by the United States, accepted pleas of *nolo contendere* from defendants Gifford-Hill-American, Inc. and United Concrete Pipe Corp., (two of the three respondents here), entering judgments of conviction and imposing fines thereon. Copies of these judgments are attached. Since the indictment against the third respondent here, the individual defendant Lloyd R. Earl, had earlier been dismissed upon the government's motion, the December 19 judgments effected a final disposition of the underlying criminal action.

Although the questions presented here are likely to recur in future cases, the respondents in this case no longer have any interest in inspection of the grand jury transcripts. Their claim rested upon their alleged needs in preparing their defenses in the criminal proceeding now terminated. Thus there no longer exists a case or controversy upon which this Court's jurisdiction can be based.

In these circumstances, we suggest that the Court vacate the judgment of the court of appeals, and remand the case to that court with instructions to dismiss the mandamus proceedings as moot. See *Simon* v. *Wharton*, 389 U.S. 425; *J. Aron & Co.* v. *Mississippi Shipping Co.*, 361 U.S. 115; *United States* v. *Munsingwear, Inc.*, 340 U.S. 36.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

JANUARY 1970.

# APPENDIX

In the United States District Court for the Northern District of Texas, Dallas Division

CR–3–690

UNITED STATES OF AMERICA

*v.*

UNITED CONCRETE PIPE CORPORATION AND GIFFORD-HILL-AMERICAN, INC.

JUDGMENT

On this 19th day of December, 1969, came the attorney for the Government and the defendant Gifford-Hill-American, Inc. appeared by counsel, Stanley E. Neely of Locke, Purnell, Boren, Laney & Neely.

IT IS ADJUDGED that the defendant Gifford-Hill-American, Inc. has been convicted upon its plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce in violation of Title 15, United States Code, Section 1, as charged in the Indictment, and the Court having asked the defendant Gifford-Hill-American, Inc. whether it had anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant Gifford-Hill-American, Inc. is convicted as charged.

IT IS ADJUDGED that the defendant Gifford-Hill-American, Inc. pay a fine unto the United States.

of America in the amount of twenty thousand dollars ($20,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for 10 days.

(S) W. M. TAYLOR, JR.,
*United States District Judge.*

Filed: December 19, 1969.

BAILEY F. RANKIN, *Clerk.*
By ——— ———
*Deputy.*

In the United States District Court for the Northern District of Texas, Dallas Division

CR-3-690

UNITED STATES OF AMERICA

*v.*

UNITED CONCRETE PIPE CORPORATION AND GIFFORD-HILL-AMERICAN, INC.

JUDGMENT

On this 19th day of December, 1969, came the attorney for the Government and the defendant United Concrete Pipe Corporation appeared by counsel, John J. Hanson of Gibson, Dunn & Crutcher, and William P. Fonville.

IT IS ADJUDGED that the defendant United Concrete Pipe Corporation has been convicted upon its plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce in violation of Title 15, United States Code, Section 1, as charged in the Indictment, and the Court having asked the defendant United Concrete Pipe Corporation whether it had anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant United Concrete Pipe Corporation is convicted as charged.

IT IS ADJUDGED that the defendant United Concrete Pipe Corporation pay a fine unto the United States of America in the amount of $20,000.00.

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for 10 days.

(S) W. M. TAYLOR, Jr.,

*United States District Judge.*

Filed: December 19, 1969.

BAILEY F. RANKIN, *Clerk.*

By ——— ———

*Deputy.*

U.S. GOVERNMENT PRINTING OFFICE: 1970

# SUPREME COURT OF THE UNITED STATES

October Term, 1969

## UNITED STATES ET AL. *v.* GIFFORD-HILL-AMERICAN, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 515. Decided February 27, 1970

PER CURIAM.

Upon consideration of the suggestion of mootness of the Solicitor General, and upon an examination of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded to that court with instructions to dismiss the mandamus proceedings as moot.